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# FORTIETH REPORT

## Judicial Council of Massachusetts

### —1964—

- I. CIVIL PRACTICE AND PROCEDURE
- II. CRIMINAL LAW, PROCEDURE  
AND PUNISHMENT
- III. THE JUDICIARY
- IV. JURY TRIAL AND JURORS
- V. JUVENILE COURTS AND OFFENDERS
- VI. MOTOR VEHICLE LAW
- VII. STATUTE OF FRAUDS
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CONSTRUCTION INDUSTRY
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OF DAMAGES

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## DEDICATION

This is the first report of the Judicial Council of Massachusetts which was not prepared by Frank W. Grinnell who passed away in 1964.

In the files of the Judicial Council, the new secretary found a post card inviting Mr. Grinnell to appear at a hearing before the Judiciary Committee on April 20, 1922.

The next day in the *Boston Globe* the report of the hearing was printed:—

### **"GRINNELL FAVORS BILL FOR JUDICIAL COUNCIL**

Saying that the courts are overworked and have no time to consider important questions of administration and reform of procedure, Frank W. Grinnell, secretary of the Massachusetts Bar Association, appeared before the House Ways and Means Committee yesterday and spoke in favor of the bill to establish a judicial council of not more than nine members to make a continuous study of the organization procedure and practice of the courts."

In this 40th report, we continue the work that Frank Grinnell began with the Judicature Commission in 1919.

Words are not easily devised to make an adequate tribute to the memory of a man like Frank Grinnell.

We, therefore, dedicate this 40th report and the future work of the Judicial Council of Massachusetts to the memory of Frank Grinnell knowing that the continuation of his life-long effort for the better administration of justice is not only a tribute to him but a guarantee to our commonwealth of integrity, liberty, and intellectual progress.





# FORTIETH REPORT

## Judicial Council of Massachusetts

### -1964-

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## The Commonwealth of Massachusetts

Boston, December, 1964

To His Excellency, The Governor of Massachusetts

In accordance with the provisions of section 34B of chapter 221 of the General Laws (Ter. Ed.), we have the honor to transmit the fortieth annual report of the Judicial Council for the year 1964.

FREDERIC J. MULDOON, *Chairman,*

STANLEY E. QUA,

ELIJAH ADLOW,

REUBEN L. LURIE,

KENNETH L. NASH,

JOHN E. FENTON,

CHARLES W. BARTLETT,

JOHN A. COSTELLO,

LIVINGSTON HALL,

RAYMOND F. BARRETT.

## THE ACT CREATING THE JUDICIAL COUNCIL

### ACTS OF 1924, CHAPTER 244

*As Amended by St. 1927, c. 923, St. 1930, c. 142, and St. 1947, c. 610*

*Now Appearing as G. L. (Ter. Ed.) Ch. 221, §§ 34A-34C*

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council," the following three new sections—*Section 34A*. There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive

council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

*Section 34B.* The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

*Section 34C.* No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of five thousand dollars.

### MEMBERS OF THE JUDICIAL COUNCIL

FREDERIC J. MULDOON of Westwood, *Chairman*

STANLEY E. QUA of Lowell

ELIJAH ADLOW of Boston

REUBEN L. LURIE of Brookline

KENNETH L. NASH of Weymouth

JOHN E. FENTON of Lawrence

CHARLES W. BARTLETT of Dedham

JOHN A. COSTELLO of Andover

LIVINGSTON HALL of Concord

RAYMOND F. BARRETT of Milton

\* \* \* \*

JAMES B. MULDOON of Weston, *Secretary*

The office of the Judicial Council is located at 10 State Street, Boston, Massachusetts 02109, and the telephone number is 742-3711.

For a brief account of the history of the Judicial Council of Massachusetts, see its 39th Annual Report for 1963 at page 11.



## CHANGES IN MEMBERSHIP OF THE COUNCIL IN 1964

Since our last report, Hon. Carl E. Wahlstrom found it necessary to give up his work with the Council in order to devote his attention to the work of the Worcester County Probate Court. We regret that Judge Wahlstrom was unable to continue his service with the Council.

Hon. John A. Costello of the Essex County Probate Court was appointed as a member of the Judicial Council in mid-summer of 1964.

Upon the death of Frank W. Grinnell, Secretary of the Judicial Council since it was created in 1924 and prior to that secretary of the Judicature Commission, James B. Muldoon of Weston, was elected by the Judicial Council to serve as its secretary.

## DISTRIBUTION OF THIS REPORT AND HOW TO OBTAIN IT

In 1925, 3,000 copies of the first report were printed as Public Document 144 for distribution by the Public Document Room. A few years later the number was reduced to 2,400. Of these, about 2,000 copies were distributed to members of the legislature, all judges, clerks of court, libraries, city and town clerks, etc. This left about 400 copies available on request for citizens of the Commonwealth, the press, libraries and professional organizations in other jurisdictions.

Those who wish to read before, as well as after, legislative action, the reports which not only all the legislators, but all the judges and other public officials get, besides having copies to keep for reference and who do not now receive this report (Pub. Doc. 144) from the State House annually, as explained above in the first paragraph, can obtain it so long as the supply lasts, and *also earlier reports* by sending a request for copies, *without charge*, to Public Document Room, State House, Boston, Massachusetts.

## 1964 HOUSE AND SENATE BILLS REFERRED TO THE JUDICIAL COUNCIL

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## I. CIVIL PRACTICE AND PROCEDURE

### RULE MAKING POWER OF THE SUPREME JUDICIAL COURT

In his annual message to the Legislature in 1964, the Governor said:

"To date, the legislatures of almost three-quarters of the states of the Union have given to their highest courts power to establish comprehensive bodies of rules governing practice and procedure in the courts. Experience has shown that such authority can go far in cutting short the almost interminable delays which now afflict our courts, in making legal processes simpler and more straight-forward, in attuning our judicial machinery more directly to the ends of substantial justice and in decreasing the expenses of litigation. I recommend that we strengthen the rule-making power of the Massachusetts Supreme Judicial Court. . . ." (S. 1-1964)

Acting upon this portion of the Governor's message, the Legislature enacted Chapter 102 of the Resolves of 1964 which reads:—

"RESOLVED That the Judicial Council be requested to investigate the subject matter of so much of the Governor's Address (Senate No. 1) as relates to strengthening the rule-making power of the Supreme Judicial Court (page 17) and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year."

Proposals to centralize "full rule-making power" in the Supreme Judicial Court are not the result of recent appraisals of our judicial system.

In the major studies of our judicial system undertaken by the Judicature Commission in the early 1920's it was concluded:—

"The existing rule-making power, which has stood substantially in its present form for so many years, should be maintained and should be exercised by the courts, and regulation by rules of court should be encouraged by the Legislature. We believe that the work of the Judicial Council suggested will be of great assistance to the courts in this connection. We do not doubt that where investigation shows that an extension of the rule-making power in regard to some particular matter is a better method of providing for improvements in administration than the slower process of legislative regulation, the Legislature will grant such extension." (House Doc. No. 597 of 1920)

Again in 1936, another legislative study commission considered the rule-making problem and concluded that existing statutes on matters of pleading and practice should be given the effect of rules of court, and that the Supreme Judicial Court and the Superior Court should thereafter regulate pleading and practice by rule.

The legendary Benjamin F. Butler, one-time General, Governor, Congressman, State Senator, *ad infinitum*, rather inelegantly

stated the proposition in his none too humble memoirs (*Butler's Book*) as follows:—

“In 1858 I was elected to the Senate of Massachusetts by the citizens of Lowell. I was the only Democrat on the ticket. In that legislature I drew the bill reforming the Judiciary of the State, so far as it could constitutionally be done, the Supreme Judicial Court being placed *out of reach of reform* by the provisions of the Constitution.”

Butler's choice of words, while typical, was not quite appropriate. The fact remains that the Supreme Judicial Court was one of the few things in existence which he did not attempt to “reform” or at least alter to his own tastes, justifiably or otherwise. The constitution stopped him.

## EXTENT OF THE EXISTING RULE-MAKING POWER OF THE SUPREME JUDICIAL COURT

Two rules have been promulgated in 1964 which demonstrate the vast scope of the rule-making power of the Supreme Judicial Court. Rule 10 now applies to every criminal case tried in the commonwealth in which a jail sentence is provided as a penalty; and Rule 14 governs every civil and criminal case from now on, and the matter of contingent fees for counsel. Because of the far reaching consequence of these rules, we print them here:—

### Rule 10.

#### ASSIGNMENT OF COUNSEL IN NONCAPITAL CASES

If a defendant charged with a crime, for which a sentence of imprisonment may be imposed, appears in any court without counsel, the judge shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel. Before assigning counsel, the judge shall interrogate the defendant and shall satisfy himself that the defendant is unable to procure counsel. If the judge finds that the defendant is able to procure counsel, he shall make a finding to that effect which shall be filed with the papers in the case. If the defendant elects to proceed without counsel, a waiver and a certificate of the judge on a form herein established shall be signed, respectively, by the defendant and the judge and filed with the papers in the case. If the defendant elects to proceed without counsel and refuses to sign the waiver, the judge shall so certify on a form herein established, which shall be filed with the papers in the case.

### Rule 14.

#### CONTINGENT FEES

1. In this rule, the term “contingent fee agreement” means an agreement, express or implied, for legal services of an attorney or attorneys (including any associated counsel), under which compensation, contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed or is to be de-



terminated under a formula. The term "contingent fee agreement" shall not include an arrangement with a client, express or implied, that the client in any event is to pay to the attorney the reasonable value of his services and his reasonable expenses and disbursements.

2. Unless expressly prohibited by this rule, no written contingent fee agreement shall be regarded as champertous if made in an effort in good faith reasonably to comply with this rule.

3. No contingent fee agreement shall be made (a) in respect of the procuring of an acquittal upon or any favorable disposition of a criminal charge, (b) in respect of the procuring of a divorce, annulment of marriage or legal separation or (c) in connection with any proceeding where the method of determination of attorneys' fees is otherwise expressly provided by statute or administrative regulations. Contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims made in accordance with usual practices in respect of such cases shall not be regarded as champertous, and shall not be subject to paragraphs 4 and 5.

4. Each contingent fee agreement shall be in writing in duplicate. Each duplicate copy shall be signed both by the attorney and by each client. One signed duplicate copy shall be mailed or delivered to each client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the attorney for a period of three years after the completion or settlement of litigation or the termination of the services, whichever event first occurs.

5. Each contingent fee agreement shall contain (a) the name and mail address of each client; (b) the name and mail address of the attorney or attorneys to be retained; (c) a statement of the nature of the claim, controversy, and other matters with reference to which the services are to be performed; (d) a statement of the contingency upon which compensation is to be paid, and whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney; (e) a statement that reasonable contingent compensation is to be paid for such services, which compensation is not to exceed stated maximum percentages of the amount collected, and (f) a stipulation that the client, in any event, is to be liable for expenses and disbursements.

6. The reasonableness of a contingent fee agreement shall be subject to review by a court of competent jurisdiction prior to the expiration of one year following the date of last rendition of services thereunder. The court shall determine the reasonableness of the fee fixed by any such agreement in the light of the circumstances prevailing at the time of making such agreement, including the uncertainty of the compensation and all other relevant factors. If relief is granted before the services have been completed, the court may either discharge the agreement or order its performance on modified terms, as justice may dictate. The court, in granting relief, may prescribe such terms as will compensate the attorney reasonably for services rendered and expenses incurred.

7. The following form may be used and shall be sufficient. The authorization of this form shall not prevent the use of other forms consistent with this rule.

(NOTE: The forms have been omitted here.)

### THE FUTURE OF RULE MAKING

The Judicial Council was established by statute in 1924 for "the continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts." (Now G. L. (Ter. Ed.) Chapter 221, Sec. 34A.)

It is fitting that the Legislature continue to encourage the courts to make such needful rules, and on such scale as appears to be necessary, as may be required to cope with the problems of judicial administration. In his message to the 1964 Legislature, the governor spoke of "comprehensive bodies of rules governing practice and procedures in the courts." We sense no ground swell which would indicate that the bench and bar demands any such "comprehensive" body of new rules. We are aware of certain areas where new methods of procedure have been suggested both to the judiciary and the Legislature.

We do not presently recommend any legislation on the issue of strengthening the rule-making power of the Supreme Judicial Court. We think none is needed. We are not sure that such legislation would have any real significance under our constitutional system of separation of powers.

The courts have accepted and abided by enactments of the legislature down through the years of our history. There has not been any notable conflict between the legislature and the judiciary over rule-making power. There is no such conflict now.

### AN ACT APPLICABLE TO SUITS IN EQUITY AND TO PETITIONS FOR DECLARATORY JUDGMENT (H. 1311)

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 146 of chapter 231 of the General Laws is hereby amended by adding at the end the following:—Section fifty-nine shall apply to suits in equity and to petitions for declaratory judgment where the suit or petition involves rights under a contract.

Under H. 1311, Section 59 of Chapter 231 would be made applicable to:



“suits in equity and to petitions for declaratory judgment where the suit or petition involves rights under a contract.”

Chapter 231, Sec. 59, provides *inter alia* that if the moving party establishes “that there is nothing to be decided except questions of law,” an appropriate order can be entered for said moving party giving judgment to him subject to an assessment of damages, if required. If Section 59 is made applicable to declaratory judgments or suits in equity, a mere judgment is not enough. There must be a final decree or a final decree of declaratory judgment. Therefore, Section 59 must be amended if it is to include suits in equity and declaratory judgments.

We have considered whether or not to restrict the use of Ch. 231, Sec. 59, to rights under *written* contracts or let it apply to any contract. We would restrict it to written contracts.

We recommend this bill in order to provide a more expeditious method of adjudication of certain suits in equity and petitions for declaratory judgment which involve rights under a contract. We think, however, that if this legislation is adopted, Section 59 of Chapter 231 should be amended by adding the following paragraph:—

#### DRAFT ACT

Be it enacted, etc.

1. If admissions in the pleadings, interrogatories or admissions under
2. section sixty-nine, stipulations or affidavits hereunder show affirma-
3. tively, in any suit in equity or petition for declaratory judgment
4. which suit or petition involves rights under a written contract, that
5. no genuine issue of material facts exists, and there is nothing to be
6. decided except questions of law, or the form of the decree, or the na-
7. ture of the relief to be granted, the court, after hearing, on motion
8. for final decree, may enter forthwith such decree or judgment as may
9. be appropriate.

#### SPEEDY COMPLETION OF PLEADINGS

House #1310 which was referred to the Council this year reads as follows:

#### AN ACT TO PERMIT THE COURT TO ORDER SPEEDY COMPLETION OF PLEADINGS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

The first sentence of section 57 of chapter 231 of the General Laws is hereby amended to read as follows:— If the defendant in an action commenced in the supreme judicial, the superior or the land court, having been duly served with process, fails to enter an appearance in writing within

twenty-one days after the return date set forth in such subpoena or writ, fails to enter an appearance in writing and file an answer within such shorter period of time as the court may set at a hearing following an application for speedy completion of the pleadings served upon the defendant, his default shall be recorded, and, after the expiration of four days from such default, the plaintiff may have a decree pro confesso or judgment entered by order of the court or by the clerk as of course without any further order.

We do not recommend this bill.

It is the contention of the sponsors of this bill that the amendment proposed will "expedite cases in which there are no defenses." The sponsors of the bill also contend that this amendment will somehow help to clear a crowded docket. We do not agree with either of these contentions, and we feel that the present practice in regard to the speedy completion of pleadings, which has been in existence for many, many years, is adequate to protect the rights of both the plaintiff and the defendant. The amendment is proposed, we think, because of its special effect on a very limited class of equity cases. Discussions with the clerks in the equity sessions failed to indicate that there is a real need to change existing procedures.

It is to be noted at the outset that the proposed statute requires, and probably must require, that any application for speedy completion of the pleadings be "served upon the defendant." This, we believe, calls for service with all the delay incident to a hearing in court, service by the officer, and the lapse of such time as the court may have allowed as reasonable for the completion of the pleadings. There would also be the expense of a second service. As the law now stands, a defendant is defaulted if he does not appear and answer within twenty-one days of the return day of the writ or subpoena. *General Laws*, Chap. 231, § 57, *Supreme Judicial Court Common Law and Equity*, Rule 14. *Superior Court Rule 25. Land Court Rule 6.*

It seems to us that any time that might be gained by the proposed statute would be too short to warrant the complication of a new procedure.

But there is a further and perhaps more important reason why the proposed statute should not be enacted. Substantially, the relief sought may be had under existing court rules. Rule one of the Common Law and Equity Rules of the Supreme Judicial Court contains this provision:

"The court in its discretion may order or permit pleadings to be filed, or any act to be done, at other times than are provided in these rules."

Superior Court Rule 2 contains the same provision. And see Land



Court Rule 6. The rules of all three courts establishing the form of the subpoena contain this provision:

"If by special order, the court so directs, the time for appearance and pleading may vary from the foregoing, and the form shall be altered to conform to the order."

Rule 7 of the Common Law and Equity Rules of the Supreme Judicial Court, Superior Court Rule 10, and Land Court Rule 6.

So in equity cases at least, the plaintiff need only apply to the court at the time of taking out his subpoena and no second service is necessary.

**RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO PROVIDING FOR NOTICE AFTER A CONDITIONAL NONSUIT OR DEFAULT BECOMES ABSOLUTE AND BEFORE IT GOES TO JUDGMENT (S. 679)**

*Resolved*, That the judicial council be requested to investigate the subject matter of current house document numbered 2628, providing for notice after a conditional nonsuit or default becomes absolute and before it goes to judgment, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

By H. 2628, Chapter 231, Section 58A, would be amended by adding the following new section:

SECTION 58B. That after a conditional nonsuit or conditional default becomes absolute, the clerk shall notify the attorneys, or the parties if there is no attorney of record, that the action will go to judgment if the nonsuit or default is not removed, and no judgment shall be entered on such nonsuit or default until at least fourteen days after such notice has been given.

Under the present practice, counsel (or parties) are notified by the clerk of the entry of a conditional nonsuit or default. Unless corrective action is taken within the time allowed, the nonsuit or default becomes final. No further notice is given. This amendment would require the clerk to issue another notice giving counsel both a warning and an additional two weeks to prevent the case from going to judgment. Were it not for the fact that removal of such nonsuit or default judgments is permitted almost as a matter of course, on motion, the proposed legislation might have merit. We feel that the clerks need not be given this additional responsibility and we are unaware of any instance where injustice has resulted from the operation of the present system.

We do not recommend this bill.

**AN ACT REGULATING THE ENTRY OF AN ORDER, JUDGMENT OR DECREE FOR FAILURE TO ANSWER OR TO AMEND OR EXPUNGE ANSWER (H. 2152)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 64 of chapter 231 of the General Laws, as appearing in the Tercenary Edition, is hereby amended by adding after the words "justice requires" the following words:—except that under no circumstances shall judgment be entered by any court for reason of the failure of the plaintiff or defendant to answer interrogatories unless and until five days written notice that judgment shall enter has been sent by the clerk of said court to said plaintiff or defendant or his attorney of record against whom judgment shall enter.

H. 2152 would amend Section 64 of Ch. 231 by requiring an additional five days notice to be given by the clerk to the party who has failed to answer interrogatories before the entry of judgment.

For the same reasons given in opposition to H. 2628, we do not recommend this bill.

**AN ACT RELATIVE TO THE REMOVAL OF ACTIONS FROM THE DISTRICT COURTS (S. 194)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter two hundred and thirty-one of the General Laws is hereby amended by striking out section 104 as amended through chapter three hundred and fifty-two, section 1 of the acts of nineteen hundred and sixty, and inserting in place thereof the following section:—

SECTION 104. Removal from District Court. No party to such action shall be entitled to an appeal. In lieu thereof any such other party may within two days after the time allowed for entering his appearance file in said court a claim of trial by the superior court, and, except as provided in section one hundred and seven, a bond in the penal sum of one hundred dollars, with such surety or sureties as may be approved by the plaintiff or the clerk or an assistant clerk of said district court, payable to the other party or parties to the cause, conditioned to satisfy any judgment for costs which may be entered against him in the superior court in said cause within thirty days after the entry thereof. The clerk shall forthwith transmit the papers and entry fee in the cause to the clerk of the superior court and the same shall proceed as though then originally entered there, EXCEPT THAT IF THE AD DAMNUM IN THE WRIT DOES NOT EXCEED \$2,000, THE CASE SHALL BE TRIED FIRST IN THE DISTRICT COURT AS IF IT HAD BEEN TRANSFERRED THERE FROM THE SUPERIOR COURT UNDER THE PROVISIONS OF SECTION ONE HUNDRED AND TWO C

OF THIS CHAPTER, AND IN SUCH EVENT THE DEFENDANT SHALL FILE SAID ENTRY FEE AND BOND WITHIN TEN DAYS AFTER NOTICE OF THE DECISION OR FINDING. SUCH FILING SHALL HAVE THE SAME EFFECT AS A REQUEST FOR RETRANSFER UNDER SAID SECTION ONE HUNDRED AND TWO C AND THE DECISION SHALL BE TRANSMITTED TO AND THE CASE TRIED IN THE SUPERIOR COURT SUBJECT TO THE PROVISIONS OF SAID SECTION APPLICABLE TO RETRANSFERRED CASES.

Removal of a case under this section shall remove any default of a defendant entered for failure to appear and answer in the district court, excepting cases in which the ad damnum does not exceed \$2,000.

\* \* \* \*

It appears to us that the purpose of this bill is to require that any case in which the plaintiff expects to recover less than \$2,000 must first be tried in a District Court. If a jury claim is filed by the defendant, a case entered in the District Courts can now be removed to the Superior Court by the defendant. Under present practice, it would not seem that a plaintiff desiring a Superior Court jury trial would be likely to enter his case in the District Court unless in error.

If a defendant now claims a jury trial in the Superior Court and removes the case there, he now has no right to have a jury trial in the first instance in the Superior Court if the amount likely to be recovered is \$2,000 or less. Under Rule 33A of the Rules of the Superior Court, and under the present provisions of G. L. (Ter. Ed.) Chapter 231, Sec. 102C et seq., the case (under \$2,000) is now sent for trial in the District Court whether it originated there or in the Superior Court. The practical effect, and the purpose of the present statutes and rules of court, is to dispose of relatively small cases in the District Court system rather than further clog the Superior Court jury session with matters which involve sums under \$2,000. The right of the parties to a jury trial is preserved, but unquestionably the exercise of this right in these less serious cases is discouraged.

#### RECENT HISTORY OF REMANDED CASES

In the 7th Annual Report of the Executive Secretary of the Supreme Judicial Court (p. 4), it is pointed out that in the five court years from 1959-1963 over 33,000 cases were transferred or remanded from the Superior Court to the District Court. Most of these remands or transfers were in the last two years. About 27,000 of these cases were disposed of in the District Courts. It is significant that 88% of the 27,000 cases were finally disposed of in the District Court either by trial or otherwise, and only 12% found



their way back to the Superior Court. Only a small percentage of the latter have been or will be actually tried out before a Superior Court jury.

#### RECENT HISTORY OF RETRANSFERRED CASES

According to the latest report of the Executive Secretary of the Supreme Judicial Court, the number of cases which were tried out in the Boston Municipal or the District Courts after remand was 11,315 during the same five year period. Four thousand, four hundred fifty-seven or over 39% of these cases were *retransferred* to the Superior Court. It is estimated that under 50% of these retransferred cases will never start trial in the Superior Court.

In his report, Mr. Collins, Executive Secretary of the Supreme Judicial Court, says "The statute in its present form has to be developed on their fate after return to the Superior Court." In the incomplete studies which Mr. Collins reports, it would appear that the vast majority of retransferred cases do not meet an ultimate fate which is vastly different from that reached by reason of the decision and award in the District Court.

Mr. Collins makes the comment that the known fact that possibly as high as 40 to 50% of the retransferred cases will never start trial in the Superior Court "does not assuage the bitterness of those who insist that double trial devices are an infringement on the constitutional right to a jury trial, and that less than \$2,000 is involved is no excuse for infringement."

#### THE SIGNIFICANCE OF THE PRESENT PROPOSAL

The proposed bill S. 194 of 1964 would not make any essential or substantial change in the present transfer and remand statutes so far as the "double trial" is concerned. As we see it, the proposed amendment merely saves the clerks in the courts the time and trouble of processing cases back and forth in the "under \$2,000" class.

Under the proposed amendment, this type of case would merely stay in the District Court until it was tried. The defendant would be required to claim his jury trial, as he does now, but he could not remove the case until it had been tried. Now he removes it, and it is merely sent back.

We would point out that under Chapter 231, § 102C as it now stands, the decision of the District Court "shall be prime facie evidence" at the later Superior Court trial, if any. Only the decision is evidence, and this may be rebutted before the jury. We would also point out that under the auditor system, the factual findings of the auditor which are necessary to his decision are *prima facie*

evidence before the jury. Vastly more may be involved in a trial before the auditor than in the \$2,000 case where only the *decision* can be put in evidence.

### RECOMMENDATIONS

We feel that the present transfer and remand statutes are undergoing a period of test. There is no need at present to amend them in any matter of substance, but we think that the proposed S. 194 is not a substantive change. We do think it will save considerable unproductive work on the part of court personnel and counsel if this amendment is adopted.

We wish to emphasize that the amendment suggested applies *ONLY* to cases where the ad damnum does *not* exceed \$2,000. Certainly this leaves counsel for the plaintiff in control of the situation.

We, therefore, recommend this bill.

### SERVICE OF PROCESS IN ZONING APPEALS

Our attention has been called to the unrealistic provision of Chapter 40A, Section 21 which governs the procedure for judicial review of the actions of Boards of Appeal in zoning cases. The present law requires all members of the Board of Appeals to be given notice if the petition for review is filed by someone other than the original applicant. Boards of Appeal consist of not less than three members; some boards have five members, and some boards have associate members. (See Chapter 40A, § 14.)

There is no reason why the layman who is aggrieved by a decision as to an adjacent parcel of land or otherwise, should be obliged to ferret out the identity and address of each member of the Board of Appeals. This board is a public body, and if it has no office, it should at least have a proper agent upon whom process can be served and to whom mail can be directed. Under present law, the layman or even the attorney, must prepare and serve or mail as many as seven copies of the bill in equity seeking judicial review.

The time periods involved in appeals of this nature are very short, and the requirement of service on every member of the Board of Appeals adds nothing of substance.

The Board does not act as a collection of individuals but as an entity. In appeals from tax abatements, it is not necessary to serve all of the assessors, and there is no logical reason why the same procedure cannot be followed with the Board of Appeals. Naming all of the members of the Board has another drawback. If one of them dies or his term expires, he can no longer be deemed to be a respondent and further motions and pleadings would probably be required.

We recommend the following:

DRAFT ACT

Be it enacted, etc. . . .

Chapter 40A, § 21, as most recently amended is further amended as follows:

By striking out the first two sentences of the second paragraph of this section and by inserting the following:

Where the bill is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant or petitioner and the Board of Appeals shall be named as parties respondent. The addresses of such original applicant, appellant or petitioner, shall, so far as known to the person filing the bill, be stated therein.

To avoid delay in the proceedings instead of the usual service of process on a bill in equity, the plaintiff shall within fourteen days after the filing of the bill in equity give written notice thereof, with a copy of the bill by delivery or certified mail to all respondents. Notice to the Board of Appeals shall be served upon or mailed by certified mail to the Town Clerk in any town or the City Clerk in any city. The plaintiff shall within 21 days after the entry of the bill file with the clerk of the court an affidavit that such notice has been given.



## II. CRIMINAL LAW, PROCEDURE AND PUNISHMENTS

### RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO AUTHORIZING APPEALS BY THE COMMONWEALTH ON QUESTIONS OF LAW UNDER CERTAIN CONDITIONS IN CRIMINAL PROSECUTIONS (H. 3725)

Resolved, That the judicial council be requested to investigate the subject matter of current house document numbered 1508, authorizing appeals by the commonwealth on questions of law under certain conditions in criminal prosecutions, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

### APPEALS BY THE COMMONWEALTH IN CRIMINAL CASES

During the period since the General Court referred this bill (H. 1508) to the Judicial Council, there has been considerable comment about law enforcement in the press, in the political arena (local and national), and in the councils of the prosecuting officers of the commonwealth.

In September, 1964, a proposal was made to the governor to call a special session of the legislature for the purpose of enacting legislation to allow certain appeals by the commonwealth in criminal cases. Other legislation was proposed also. The governor declined to call the legislature into session for these matters.

In *Commonwealth v. Cummings*, 3 Cush. 212 (1849), our Supreme Judicial Court held that it was for the General Court to decide whether or not the Commonwealth should have a right of review in criminal cases.

Massachusetts is one of the few states which does not allow the prosecution to appeal from "technical" rulings which "kill" the indictment. The fact that the commonwealth is a jurisdiction where such appeals have not been authorized is no indication that legislation is needed.

The principal areas in which it is urged that the Commonwealth should have the right of appeal are the following:—

#### 1. MOTION TO QUASH INDICTMENT

Chapter 277, Sec. 33 now provides:

"An indictment shall not be quashed or be considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defense; nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars under section forty."

There are, of course, other provisions of the statutes which deal with the adequacy and sufficiency of the indictment. Many corrective provisions were enacted by the General Court in 1899 during Governor Wolcott's administration. The development of the law since that time clearly indicates that unless the indictment is so vague or confusing that the defendant cannot defend himself, there is now no real danger of having an indictment quashed on technical grounds *if* in fact a crime is set forth which is recognized and stated with reasonable definition.

With the consent of the court, an indictment may be amended on motion if the defendant "would not be prejudiced in his defense." (Chapter 277, § 35A)

If the original indictment has been quashed, there is nothing to prevent the reindictment of a person for the same alleged crime.

We do not find that there is any connection between any lawlessness which may exist and the fact that in Massachusetts an indicted person may be able to have his indictment quashed by a justice of the Superior Court under conditions which deny the prosecution the right of appeal.

When changes in the law concerning indictments are proposed, we would deem it wise to point out that a person may be indicted for activities which are outside the usual criminal ambit. It will be remembered that one of the great moments of the history of our commonwealth involved the quashing of the indictment returned by the federal grand jury against Theodore Parker for his activities in the attempt to rescue the runaway slave, Anthony Burns, from the clutches of the federal marshal at Boston. This cause which took place in 1854, resulted from the action of Judge Edward Loring, who was also a United States Commissioner, who directed the detention of Burns under the fugitive slave law. Theodore Parker and others attempted to rescue Burns. It was their deep conviction that the "law of God" was superior to the law which allowed seizure of a human being and his return to slavery.

Parker was arraigned and released in bond by the Federal Court. Thereafter, the lawyers who appeared for him and his associates filed a motion to quash the indictment on various technical grounds. The attempt to quash was more an attack on the legality of the order under which Judge Loring ordered the marshal to seize Burns so he could be returned to Virginia. At the hearing, the

motion to quash the indictment of Stowell, a co-defendant with Parker, was allowed.

After the hearing on the motion, the U. S. Attorney Hallett, *nol proessed* the indictment before the Court could rule on the motion to quash, which Parker had filed.

This is one instance where a "Motion to Quash" has loomed large in history, and where as a result of such motion, a sensational trial was avoided at a critical period.

More recently in 1943 in this commonwealth, various police officials were indicted for the offense of conspiracy to allow divers persons to promote, set up, and operate lotteries, establishments for the registering of bets, *and* for willfully failing, refusing, omitting, and neglecting to perform the duties legally incumbent upon them as public officers in charge of the police department.

On motion to quash, and on pleas in abatement, indictment of the police commissioner was quashed. The indictment of lesser officials was allowed to stand on their motions to quash. Another indictment of the police commissioner was returned. Again on motion to quash, it was quashed as to the commissioner but not as to other lesser police officials.

It was the contention of the police commissioner that he was under no obligation to suppress gaming houses or lotteries. His claim was that his duties as commissioner did not extend to the detection or suppression of such activities. He claimed that his function was to organize and administer the police department, a function which had formerly been exercised by the Board of Aldermen.

This proceeding against the commissioner is of interest because he was indicted; the indictment was quashed by a Justice of the Superior Court; he was re-indicted and the second indictment was quashed. He could have been indicted again.

There is the possibility that indictments can be used for purposes which are political as well as judicial.

As a result of the 1943 incident with the police commissioner, it was urged by the Attorney General that the law be amended so as to allow the commonwealth to appeal from the action of the single Justice of the Superior Court in quashing an indictment. The report of the Attorney General included the following comments:

"The rulings of the two single judges of the Superior Court obliterating as to the police commissioner of the City of Boston two successive indictments presented by a grand jury which had devoted months of study and labor in connection with the Boston gambling rackets is submitted as sufficient illustration of the need of such a reform. There is no sound reason why the prosecution should be left so completely at the mercy of single judges. The



people had nothing to say about the appointment of these judges and no practical control over them once they were appointed.

"With the Commonwealth powerless, any prosecution can be stopped in its tracks by a single judge assigned to a particular courtroom to act upon a particular case.

Massachusetts is one of five states which today deny the prosecution a right of appeal or review.

"Massachusetts is the only state in the country where single judges, beyond the power of control of the people, are permitted to possess the arbitrary power to halt prosecutions."

(*Report of Attorney General*, 1945, Pub. Doc. No. 12, pp. 99)

It was then urged that Chapter 278 be amended by adding a new section 36 which would read:—

"SECTION 36. Appeals taken and exceptions alleged by the commonwealth in criminal cases shall be decided by the Supreme Judicial Court which shall render final judgment thereon or remand the case to the Superior Court for further trial or for such other proceedings as may be required by justice and the state of the case. Provided that a final judgment in favor of the defendant, following a jury verdict of nongUILTY shall not be affected by the decision of the Supreme Judicial Court, unless such verdict was returned by direction of the Court."

Other amendments were also proposed to Chapter 278, the result of which would have been that unless there was a verdict of a jury "undirected and untrammelled, on the merits of the case" as a result of which the defendant was found not guilty, the rights of appeal of the Commonwealth and the defendant would be the same.

The recommendations of the Attorney General were not accepted.

We would call attention to the editorial comment in the *Boston Herald* on September 16, 1964:

#### NO PANACEA FOR CRIME

Aroused by the recent outbreak of gangland slayings and a general increase in crime, seven of the state's district attorneys are pressing for a special session of the Legislature to consider two anti-crime bills they support.

One would give the state the right to appeal adverse pre-trial rulings on such legal issues as the quashing of indictments and the suppression of illegally-obtained evidence. The other would permit a police officer to arrest without first obtaining a warrant when he actually witnesses someone in the act of bookmaking.

There is merit to both bills. The first would lend symmetry to the law, balancing the rights of defendants to have improper indictments quashed and illegally-seized evidence suppressed with the prosecution's right not to have proper indictments quashed and legally-obtained evidence suppressed. The

second might enable police to make some bookmaking arrests they are now unable to make.

Yet neither measure offers hope of materially lowering the crime rate, much less of halting gangland murders.

Venal or bumbling judges who rule against the prosecution on proper motions to quash indictments or suppress evidence are certainly few and far between. Most judges, in fact, tend to give the prosecution the benefit of the doubt in such matters.

And it is surely within the means of honest and efficient police departments to control bookmaking without permission to arrest bookmakers without warrants.

This is not to say that the underworld might not attempt to block the enactment of either or both of these bills. But neither represents a really serious threat to their interests. Certainly it is unnecessary to make the taxpayers foot the bill for a special session of the Legislature to consider these measures when the next regular session is little more than three months away.

We should not overlook the provisions of the Massachusetts constitution, and its Declaration of Rights, where it is provided:

"XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him. . . ."

There is thus an obligation on the government in this commonwealth which may or may not be present elsewhere. We live under our constitution, not some other.

Under the constitution of the United States, there appears to be a right on the part of the sovereign state to appeal from rulings or decisions of the trial court to its appellate court (Supreme Court). The legal principle is stated in *Palko v. Connecticut*, 302 U.S. 319:—

"The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. . . . This is not cruelty at all, not even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge—has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before."

The existence of this legal principle is therefore noted.

There is no reason to oblige a defendant to be tried on an indictment which charges no crime either under the statutes or at common law. There is no reason why a motion to quash such an indictment should not be allowed. Likewise, there is no reason to require a defendant to meet an indictment which is so deficient that it is

insufficient to enable the defendant to understand the charge and to prepare his defense.

We do not feel that the Supreme Judicial Court, already taxed with judicial duties, should be given additional burdens where the necessity is not made out.

It was recently pointed out in the *7th Annual Report (1964) to the Justices of the Supreme Judicial Court* that Massachusetts and North Carolina are the only two, of the thirteen states with a population of over four million, which do not have an intermediate appellate court between the major trial courts and the Supreme Court.

## 2. SUSTAINING A DEMURRER TO AN INDICTMENT

This was the second heading in H. 1508 which we were asked to consider. Since we think that this simply means a ruling that the indictment does not charge any criminal act, we feel that our observations about motions to quash are applicable to any situation which could come under the second heading.

## 3. ALLOWING A PLEA IN BAR

The principal "Plea in Bar" which can be used to defeat an indictment is a former acquittal. Chapter 263, Section 7 provides:

"A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits; but he may plead such acquittal in bar or any subsequent prosecution for the same crime, notwithstanding any defect in the form or substance of the indictment or complaint on which he was acquitted."

It is further provided (Ch. 263, § 8) that if there has been an acquittal by reason of a variance between the indictment or complaint, and the proof, or by reason of a defect of form or substance in the indictment or complaint, he may be again arraigned, tried, and convicted for the same crime on a new indictment or complaint, notwithstanding such former acquittal.

We also have in mind that the 5th Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

Whether or not a plea in bar should be sustained or overruled is surely a matter which can be disposed of by the trial court. The present statutes of the commonwealth appear to deal adequately with any known situation where a plea in bar has been allowed. Whether or not there has been a prior conviction is a matter of fact. If it is a fact that the defendant has been previously convicted of the same offense, the appeal would be on the basis that the facts found by the Superior Court (or the District Court in cases under Chapter 263, § 8A) should be reexamined by the Supreme Judicial



Court. There does not appear to be any real substance in a proposal to allow the government to appeal from the allowance of pleas in bar.

#### 4. ALLOWING A MOTION TO SUPPRESS EVIDENCE BEFORE TRIAL

The procedure for the suppression of evidence before trial, and thus preventing the prosecution from proving its case, is a more recent addition to the criminal practice in this commonwealth.

Few police officers in this commonwealth are now unaware of the effect of the Mapp case (*Mapp v. Ohio*, 367 U.S. 643, 1961) where it was held plainly that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, *inadmissible in a state court*. See also the *Marcus Case* in 367 U.S. 707.

Until this became the law of the land, it was the accepted law of Massachusetts that evidence seized by an officer under an illegal search warrant or in excess of the authority in the warrant, or by other irregular means, was admissible at the criminal trial.

A review of the history of the law of Massachusetts as it concerns search and seizure, is found in the 39th Report of the Judicial Council for 1963. In that report we made no recommendation for specific legislation to define the legal limits in this area. We make no recommendation now.

In *Com. v. Jacobs* 346 Mass. — (1963) the defendant was indicted and convicted of possession of obscene materials for the purposes of sale. There was a motion to quash the indictment and to suppress the "obscene" evidence upon which the conviction was based. The defendant contended that the search warrant was too broad and that it failed to describe particularly the things to be searched for and seized.

Under the law then in effect in Massachusetts (*Commonwealth v. Wilkins*, 243 Mass. 356) it was not necessary for the court, as a matter of law, to grant the motions to suppress the evidence even though it might well have been obtained by an illegal method.

The decisions of the United States Supreme Court supervened at this point and brushed aside the authority of *Commonwealth v. Wilkins*.

The reaction of our Supreme Judicial Court to the federal decisions can be found, at least in first instance, in the *Jacobs Case*.

What is an unreasonable search or seizure?

Can a test of reasonableness be established in a statute or in merely a few appellate decisions? Can the police of the commonwealth be reoriented overnight, so to speak? These are the questions which must be answered in connection with motions for the suppression of evidence.

If a warrant states merely that there are "obscene, indecent, or impure books, pamphlets, etc., manifestly tending to corrupt the morals of youth," etc.—at a house at No. 1080 Avenue—is this sufficient to permit a search and seizure of whatever is found there?

If it is left to the officer to decide what is obscene, indecent, etc., is the seizure valid?

It is the conclusion of the Jacobs case, and the federal decisions to which it refers, that to leave to the officer, and not the judge, the judgment of whether or not something is obscene is sufficient to invalidate the search and seizure. The constitutional right of the individual does not permit a visit from the police under a general search warrant.

On the other hand, it is hardly practical if one sought to obtain a search warrant for obscene materials, to notify the court in advance of every species of pornography that might be present including the names of the publications and a brief description of what was contained on every page.

The case of *Commonwealth v. Mekalian*, 346 Mass. — (1963) is another instance where a motion to suppress evidence was allowed.

At the "Dog Track" the defendant was observed placing a bet with a "bookie." The bet money was handed by a police officer to Toscano who then handed it to Mekalian. When the dog won, Mekalian paid off the bet to the police officer and was then arrested without a warrant.

After the arrest the officers seized racing sheets and other materials including money which tended to show that there had been a violation of the laws against gambling.

On appeal from a conviction in the District Court, Mekalian pressed a motion to suppress the evidence obtained by the officers.

Since the law did not allow arrests for a misdemeanor unless there was a breach of the peace, the motion to suppress the illegally obtained evidence was allowed.

These two cases demonstrate the practical effect of the *Mapp* case on the day to day operations of the police department.

If a defendant is now brought before the court to answer a complaint or indictment, it is possible for him to move immediately to suppress the evidence which would convict him on the ground that it was illegally obtained. The decision of the court on this motion to suppress is final under present law.

We have considered one proposal this year (*H. 1528*) which would reserve decision on the motion to suppress (in effect) until after the defendant had been convicted and the conviction reviewed by the Supreme Judicial Court. We have not recommended this bill.

We cannot find any special circumstances under which we could urge that the commonwealth should have the right of appeal in cases where a motion to suppress evidence is allowed. We are unable to say that we lack confidence in our trial courts.

We also point out Chapter 278, § 30 which says:—

If upon the trial of a person convicted in the Superior Court a question of law arises, which in the opinion of the presiding justice is so important or doubtful as to require the decision of the Supreme Judicial Court, he shall, if the defendant desires or consents to it, report the case so far as necessary to present the question of law arising therein; and thereupon the case shall be continued to await the decision of the Supreme Judicial Court.

This statute was utilized by Judge Paquet in the case of *Commonwealth v. McCleary*, 345 Mass. 151. The judge of the Superior Court found the defendant guilty of possessing a narcotic drug, but being of the opinion that the conviction raised questions of law which were doubtful and important, no sentence was imposed and the case was reported to the Supreme Judicial Court.

The issue here was illegally obtained evidence and the defendant had filed a motion to suppress. The Supreme Judicial Court, citing the case of *Commonwealth v. Spofford*, 343 Mass. 703, decided that the evidence was illegally obtained and should have been suppressed. Although convicted in the Superior Court, the Supreme Judicial Court ordered that the indictment be dismissed.

**The Judicial Council does not recommend H. 1508 allowing appeals by the Commonwealth. Five of the members of the Council are opposed to such appeals while five members are in favor of this bill. The views of those who favor the bill are set forth below.**

#### POSITION OF MEMBERS IN FAVOR OF APPEALS BY THE COMMONWEALTH

The majority report on this bill traces the history of various earlier attempts to secure somewhat similar legislation. But conditions have now drastically changed in Massachusetts. Recent decisions by the Supreme Court of the United States have made clear a pressing need for such legislation. In addition, the bill now referred to us is a great improvement on all of these earlier bills, as it contains numerous important safeguards for the appellees. For these reasons it is recommended that H. 1508 should be retained for further study. It should not be rejected merely because earlier bills were defeated, when they lacked these safeguards, and were presented to the legislature before the 1961 decision of the Supreme Court in *Mapp v. Ohio*, 367 U.S. 643.

As the majority report does not print the bill, it is set forth here in order to show the new provisions which have been inserted by



the Attorney General to protect the rights of a defendant who has won on a "technical" ruling in the lower court, which may be a District Court, and is always a single Judge court. The provisions of H. 1508 of 1964 are as follows:

"Chapter 278 of the General Laws is hereby amended by inserting after Section 28D the following section:

"SECTION 28E. An appeal may be taken by and on behalf of the Commonwealth of Massachusetts by the district attorneys or the attorney general from the superior court to the supreme judicial court in all criminal cases from a decision, order or judgment of the court (1) quashing an indictment for any reason, (2) sustaining a demurrer to an indictment, (3) allowing a plea in bar, or (4) allowing a motion to suppress evidence before trial.

"Such appeal shall be taken within ten days after the order, decision or judgment has been entered, and in any case before the impanelling of a jury or other actions putting the defendant in jeopardy. The appeal shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal, trial shall be stayed, and the defendant shall be released on personal recognizance.

"All expenses of an appeal taken by the commonwealth hereunder shall be borne by the commonwealth, including reasonable fees of defense counsel, subject to approval of a judge of the superior court, and costs of the defendant's brief in the supreme judicial court.

"Rules of practice and procedure with respect to appeals authorized by this section shall be the same as those now applicable to criminal appeals under section twenty-eight of chapter two hundred and seventy-eight of the General Laws.

"No appeal shall be allowed hereunder the result of which will be to place the defendant in double jeopardy under established rules of law."

This bill protects the rights of the defendant appellee in many ways:

(1) The appeal must be taken within 10 days and must be diligently prosecuted.

(2) The trial is stayed pending the appeal, and the defendant is released without bail on his own recognizance.

(3) All expenses of the appeal on both sides are borne by the Commonwealth, including defendant's reasonable counsel fees and costs of his brief in the Supreme Judicial Court.

(4) No appeal is allowed where it would place the defendant in double jeopardy.

With the defendant's rights thus protected, the public need for such legislation should be further considered. Should a single Judge, by a pre-trial "technical" ruling on a legal question, bar the Commonwealth forever from proceeding in the case, without there being any way to secure a review by the Supreme Judicial Court of such a question of law? Although the Commonwealth is not barred

from securing another indictment, the lower court's decision on a motion to quash, a demurrer, a plea in bar, or a motion to suppress evidence, will be *res judicata* between the parties, and will be the law in the particular court in which it is decided.

Should we retain our present legal system, which requires a Judge to rule *against* a defendant on any such matter, if he wishes to permit the question to be decided by an appellate court? These pre-trial legal questions are difficult. They must follow decisions of uncertain breadth in courts outside the Commonwealth. Or should such decisions be subject to appellate review in those few cases of sufficient importance to the Commonwealth to induce the prosecuting authorities to prosecute an appeal for which the Commonwealth must pay the full costs of both sides? Surely we should further consider whether a system of appeals by the prosecuting authorities which, as the majority report states, is in effect in all but a few states, is needed in Massachusetts under present conditions.

Respectfully submitted,

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STANLEY E. QUA  
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## ARRESTS FOR MISDEMEANORS WITHOUT A WARRANT

The following Senate Bill (#196) was referred to the Council this year.

### AN ACT RELATING TO ARREST FOR MISDEMEANORS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 28 of Chapter 276 of the General Laws is hereby amended by striking out such section as it now appears, and substituting in place thereof, the following:—Any officer authorized to serve criminal process may arrest without the issuance of a warrant, and detain a person found by him in the act of stealing property in his presence, regardless of the value of the property stolen, *and may arrest and detain a person who commits a misdemeanor in his presence*, and may arrest and detain a person charged with a misdemeanor, without having a warrant for such arrest in his possession, if the officer making such arrest and detention shall have actual knowledge that a warrant then in full force and effect for the arrest of such person has in fact issued.

The words in italics introduce a new element into the law of arrest. At the present time, a police officer may not make an ar-

rest for a misdemeanor which is committed in his presence unless there is a breach of the peace.

The police of the Commonwealth have been saddled with many problems as a result of the *Mapp* case. We believe the time has come to allow police officers to act if they observe the commission of a misdemeanor before their eyes. We think that such power will aid them in the enforcement of the law. We are confident that the officers of our police departments will curb any tendency to abuse this wider authority. *We, therefore, recommend the enactment of this statute.* We feel that the failure to enact this law at this particular time, would give an undue advantage to those who openly flout our criminal statutes.

### "GLUE SNIFFING"

The following H. 932 was referred to the Council this year:

#### AN ACT PROHIBITING THE INHALATION OF CERTAIN DANGEROUS CHEMICALS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 272 of the General Laws is hereby amended by § 20 of chapter 715 of the acts of 1956, the following section:—

SECTION 48A. Whoever, except in the course of formal education or employment, willfully inhales the fumes of glue, carbon tetrachloride, acetone, ethylene, dichloride, toluene, chloroform, xylene or any combination thereof, shall be punished by a fine of not more than fifteen dollars, or by imprisonment in a jail or house of correction for not more than thirty days.

The purpose of this bill is to prohibit "glue sniffing." Some juveniles and a number of adults have in the recent past taken to inhaling the fumes from glue of the type which is used in making airplane models and similar toys. The desired effect which these people seek is that of intoxication. The fumes from the various chemicals specified in the above bill can produce intoxicating effects on the human being, especially the youngster.

We note a case this year in Maine where a twelve year old boy died as a result of "chronic inhalation of airplane glue" over six or seven years. Although the medical director of the hospital said that the use of the glue by this boy was innocent and was restricted to model building, he said further that the exposure to the glue affected the blood clotting mechanism and the ability to produce proper amounts of red and white blood cells. In another report in Roanoke, Virginia, we discover that two boys thirteen and fourteen emptied the contents of the plastic cement tube into a bag and sniffed the glue vapors. The effect of this on the older boy was that he became apparently wildly intoxicated and later shot himself.



We do not recommend this bill.

While we do not sanction glue sniffing, we feel that this bill or any bill which could be drawn to create a new statutory crime of "inhalation of chemicals," is not necessary or appropriate. The statute books cannot be filled with every possible situation of wrongdoing set forth with precision and detail.

The chemicals named in this bill are apparently intoxicants and are harmful. If an adult is found to be intoxicated as a result of glue sniffing or conducts himself in an unlawful manner by reason of sniffing glue, he can be dealt with under existing law. In the juvenile case, we have doubts that the penalty is either deterrent or realistic. We feel that statutes of this kind ought not be enacted.

### **TRESPASSING FOR THE PURPOSE OF "SPYING"**

The Council was asked to consider the wisdom of enacting the following new criminal law:

"Whoever shall enter upon the premises of another and unlawfully attempt to or does unlawfully peek, pry or look into a window, door or other opening of a house, building or other structure with the intention of spying upon in any manner any person or persons therein, shall be punished by a fine of not more than one hundred dollars, nor more than one year in jail. Any officer authorized to serve criminal process may arrest without the issuance of a warrant and detain a person found by him in the act of committing this offense." (H. 2155)

We now have various criminal laws which apply to people who "peek, pry or look into a window." We think that the situation is adequately covered by existing law.

A criminal statute must have clear and precise terms which define the offense. Nothing in this proposal has that definition upon which a conviction could be based.

We do not recommend this bill.

### **RELEASE ON BAIL OF CERTAIN INDIGENT PERSONS AND PROVISION THAT FAILURE TO APPEAR SHALL CONSTITUTE A CRIMINAL OFFENSE**

After considerable study, the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate has recommended that federal legislation be enacted in order to allow indigent defendants to be released on personal recognizance without the necessity of furnishing sureties.

Need for reform of this type has been noted by the press. An editorial in the *Boston Herald* on October 31, 1964, attacks the problem from another angle:—

## EXPERIMENT IN JUSTICE

"One of the most glaringly discriminatory aspects of our system of justice has been the administration of bail. The rich or well-to-do person charged with a serious criminal offense is usually freed on bail except where the likelihood of his failing to return to stand trial is considered exceptionally great. The indigent accused, however, no matter how likely his return may seem to the court, must stay behind bars until the time comes for his trial.

"Often, because of court congestion and other problems, this is a matter of months.

"When it is realized that a substantial number of accused persons forced by reasons of poverty to wait months in jail are ultimately found innocent, the injustice of the bail system is apparent.

"Down in Washington, D. C., an encouraging bail experiment has been taking place with Ford Foundation funds. This project is based on the premise that most persons who show up for trial after being released on bail do so because of their character and community ties—not because of their fear of forfeiting bond payments or being hunted down by professional bondsmen.

"From January 20 to December 30 of this year, one hundred and thirty-nine felony suspects in the District of Columbia were released without bail bond on the recommendation of the bail project staff after study of their character and background. Only three of them failed to appear and even these did not escape justice: they were found in the District of Columbia, two of them at home.

"In addition, 74 misdemeanor suspects were released without bail on recommendation of the project staff, only two of whom jumped bond. This record was certainly much better than that of suspects released on bonds put up by professional bondsmen.

"Significantly, 42 percent of those released under the project were able to prove their innocence of the charges, as compared to the average rate of 32 percent in the District of Columbia.

"In addition to those proved innocent, another 33 percent of the freed suspects were placed on probation following their convictions—justifying the project staff's determination of their fitness to be at large in the community. "Project Director David J. McCarthy points out that suspects who are able to obtain pre-trial release are apparently better able to aid in their own defense or to show the courts that they should be given another chance to keep their freedom even if they are convicted.

"Of course, the project staff did not recommend the release without bail of all suspects. It disqualified for release certain classes of bad-risk suspects, including those with two or more felony convictions and convicted bail jumpers and jail escapers.

"But the project has already demonstrated that, with proper screening techniques, many poor persons accused of crime can safely be released without bail pending trial—and at a material saving to the taxpayers in reduced jail maintenance costs."

If defendants are to be permitted to go from the court after having been charged with a crime on their personal recognizance, there should be adequate grounds upon which the court may safely assume that such person will return for trial or other disposition. Some defendants cannot safely be released under any conditions. Some who are now detained due to their lack of money to provide sureties could be released if there was an assurance that they would return. It is felt that if the act of "bail-jumping" is made a criminal offense, a sufficiently strong deterrent will be present, and the defendant will return to court on schedule.

The proposed federal legislation would call for a fine of not more than \$5,000 or a prison term of not more than five years in the event that a person admitted to bail willfully failed to appear or failed to comply with the terms of his personal recognizance.

We recommend the following:—

**AN ACT TO COMPEL APPEARANCE IN COURT BY CRIMINAL SANCTION.**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 268 of the General Laws is hereby amended by inserting after section 38 the following section:—

SECTION 39. A person who is released by court order or other lawful authority on bail or recognizance on condition that he will subsequently appear personally at a specified time and place and who fails without sufficient excuse to appear personally at that time and place shall be fined not more than one thousand dollars or imprisoned in the house of correction for not more than one year, or both, but in no event shall the fine or imprisonment exceed the maximum sentence prescribed for any crime in connection with which his appearance is required.

**MAXIMUM SENTENCE FOR A SECOND OFFENSE OF  
UNNATURAL ACTS WITH A CHILD**

**An Act Adding A Maximum Sentence For A Second Offence Of Unnatural and Lascivious Acts With A Child Under Sixteen Since No Maximum Has Been Provided**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 35A of chapter 272 of the General Laws is hereby amended to read as follows:—

SECTION 35A. Whoever commits any unnatural and lascivious act with a child under the age of sixteen shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years, and whoever over the



age of twenty-one years commits a second or subsequent such offence shall be sentenced to imprisonment in the state prison for a term of not less than five years nor more than ten years. Except in the case of the first offence, the imposition or execution of the sentence shall not be suspended, and no probation or parole shall be granted until the minimum sentence shall have been served.

We do not recommend this bill.

The present section 35A of chapter 272 reads as follows:—

SECTION 35. *Unnatural and Lascivious Acts*: Whoever commits any unnatural and lascivious act with a child under the age of sixteen shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the state prison for not more than five years, or in jail or the house of correction for not more than two and one half years, and whoever over the age of twenty-one commits a second or subsequent such offence shall be sentenced to imprisonment in the state prison for a term of not less than five years.

Under the proposed amendment, it would be necessary to sentence a second offender to a prison term. Neither suspension of the sentence nor probation nor parole could be granted until such an offender served at least five years in prison.

The term could be as much as ten years, but parole could begin only after five years.

Many types of sexual offenses are included or could be included under this section 35A. An example of the manner in which prosecutions could be brought under this section can be found in the case of *Com. v. Marshall*, 338 Mass. 460. We are aware that certain types of offenders can be involved in outrageous acts which shock the community, but there are many other instances in our society where a prosecution could be brought under this section for an offense which was not as gross and shocking. We cannot escape the fact that certain juveniles have been known to victimize adults for the purpose of extortion and for other purposes.

Because of the fact that the five-year sentence to prison is mandatory and there is no chance for any other disposition, we believe that this proposed statute is too severe. We are also of the opinion that it is not realistic to bind the court in this manner and, therefore, are unable to recommend this bill as a solution for the type of problem with which it deals.

#### **AN ACT CONCERNING APPEAL PROCEDURES FOR VIOLATION OF THE LAWS RELATIVE TO OBSCENE THINGS AND OBSCENE BOOKS (H. 1528)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 28 of chapter 272 of the General Laws, as amended by chapter 492 of the acts of 1959, is hereby further amended by adding at the end the following three sentences:—Upon appeal from a conviction under General Laws, chapter two hundred and seventy-two, section twenty-eight, the appeal shall be considered on the entire record. In considering said appeal the appellate court shall review the full record to determine: First, if the appellant is guilty under the provisions of General Laws, chapter two hundred and seventy-two, section twenty-eight, and, second, if the appellant was properly found guilty, before considering whether the arrest and/or seizure by warrant was reasonable. If the determination of the appellate court, based on the entire record, is that the appellant is guilty then he shall be estopped from pleading the technical defense that the warrant was too general and not specific.

H. 1528 is a proposal which in effect would require the Supreme Judicial Court, on an appeal from a conviction under G. L. chapter 272, § 28, to first determine whether or not the defendant was properly found guilty of an offense arising out of the possession and/or sale of obscene materials.

If under § 28 the Supreme Judicial Court came to the conclusion that the guilt had been established, it would then take up any contentions that the defendant might have made that his arrest or the seizure of his obscene materials was reasonable.

The proposal in H. 1528 would then specify:—

“If the determination of the appellate court, based on the entire record that the appellant is guilty, then he shall be estopped from pleading the technical defense that the warrant was too general and not specific.”

We do not recommend this bill.

If the evidence for the conviction—no matter how overwhelmingly it may prove guilt—has been obtained by means of an illegal search and seizure, how can the defendant be deprived of a constitutional right to plead “the technical defense” of illegal search and seizure.

Many cases have been and will be reversed on appeal because of some reason other than the fact that the evidence failed to prove guilt. It occurs to us that a prisoner may confess his complete guilt. If the confession is tainted, and this can be shown, the conviction cannot be upheld. We do not wish to avoid the practical problems involved in obtaining convictions of persons who have possession, for sale to minors of hidden pornography. A specific description of such material is not easy. We know this. But we cannot run counter to the rulings of the United States Supreme Court, and our own Supreme Judicial Court, by recommending a statute which most certainly would be declared unconstitutional by both of them.

## MANDATORY JAIL SENTENCE FOR USE OF TELEPHONES FOR GAMING

“An Act Relative To The Penalty For A Second Offence Under The Laws Prohibiting Lotteries, Games Of Chance And The Keeping Of Places For Registering Bets Or Dealing In Pools.”

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 10 of chapter 271 of the General Laws is hereby amended to read as follows:—SECTION 10. Whoever, within five years after being convicted of any offence mentioned in sections seven, eight, nine, seventeen and seventeen A commits the like offence, or any other of the offences therein mentioned, shall, in addition to the fine therein provided, be punished by imprisonment for not less than three months nor more than one year, and the sentence imposing such fine and such imprisonment shall not be suspended.”

We recommend this bill.

In our 31st Report for 1955, we asked to be excused from passing on the matter of mandatory jail sentences for specific offenses. We felt that this was a matter of policy for the General Court to decide. Since we made this comment, it appears that chapter 271, § 10 has been amended so as to require mandatory sentences for second offenses in various gaming violations. Section 17A now prohibits the use of telephones for gaming purposes, but at present, there is no mandatory jail sentence for a second offense under Section 17A.

We are mindful of the fact that in the Report of the Special Commission investigating organized crime in Massachusetts which was created under Chapter 147 of the Resolves of 1955, (Senate Doc. No. 700 of 1957) it is said at p. 141:—

“It is true that the telephone is the principal instrument of the bookmaking office. Without the telephone, bookmaking for all practical purposes as a law enforcement problem, would cease to exist.”

The Special Commission found further that the telephone makes bookmaking much easier and the total “take” is much higher because of it. But it also said “If all the telephones in the Commonwealth were removed, bookmaking would not be eliminated, but its whole time schedule would be revised.”

There is no doubt that the use of telephones for gaming purposes is as much a part of the operation as the room, house, or other place where the business is done.

Since the legislature has provided that the owner of the premises where gambling occurs faces a mandatory jail sentence for know-



ingly allowing his premises to be used for this purpose, we see no reason why a person who knowingly lets his telephone be used for betting should not face the same penalty.

## AN ACT PROVIDING FOR THE SENTENCING OF HABITUAL CRIMINALS (H. 551)

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 279 of the General Laws is hereby amended by striking out section 25 and inserting in place thereof the following section:—

SECTION 25. *Punishment of Habitual Criminals.*—Any person who, after having been convicted within the commonwealth of one or more felonies, or who has been convicted under the laws of any other state of a crime or crimes which, if committed within the commonwealth would be a felony or felonies, commits another felony within the commonwealth shall be sentenced as follows:—

A. Upon conviction of a second felony, if the second felony is such that, upon a first conviction the offender might be sentenced to imprisonment for any term less than life, he shall be sentenced to imprisonment for a term not less than half the longest term nor more than twice the longest term prescribed on the first conviction.

B. Upon conviction of a third felony, if the third felony is such that, upon a first conviction, the offender might be sentenced to imprisonment for any term less than life, he shall be sentenced to imprisonment for a term not less than the longest term nor more than three times the longest term prescribed upon a first conviction. However, if the subsequent felony is such that, upon first conviction, the offender might be sentenced to imprisonment for life, he shall be sentenced to the state prison for life.

C. Upon conviction of a fourth felony, said person shall be sentenced to the state prison for life.

D. Wherever in another section of these General Laws there is provided a minimum sentence for a second or for any subsequent offence, and said minimum is greater than is provided in this section, the minimum so specified elsewhere shall control.

SECTION 2. Chapter 279 of the General Laws is hereby further amended by inserting after section 25 the following sections:—

SECTION 25A. *Resentencing Habitual Criminals.*—If at any time either after conviction or sentence, it shall appear that a person convicted of a felony has been previously convicted of a crime amounting to a felony in this state, or a crime under the laws of any other state which, if committed in this state, would be a felony, it shall be the duty of the district attorney having jurisdiction to file in the court in which the most recent conviction took place, an information charging the person as an habitual offender. The court shall cause such defendant, whether or not already confined in prison, to be brought before it, shall inform him of the allegations contained in the information, and

of his right to be tried as to the truth thereof, and shall ask the defendant whether or not he is the same person as charged in the information. If the defendant denies being the same person, or refuses to answer, or remains silent, his plea or the fact of his silence shall be entered of record, and a jury shall be empanelled to inquire if the offender is the same person mentioned in the several records as set forth in the information. If the jury finds that the defendant is the same person, and that he has in fact been convicted of such previous crimes as charged, or if he acknowledges or confesses in open court, after having been duly cautioned as to his rights, that he is the same person and that he has in fact been convicted of such previous crimes as charged, then the court shall sentence him as provided in section twenty-five in the case of an habitual offender, but shall deduct from the sentence any time actually served under an earlier sentence in the same case and the remainder of the two shall run concurrently.

SECTION 25B. *Duty to report concerning Habitual Offenders.*—Whenever it is known to any warden or prison, probation, parole, or police officer, or other law enforcement officer, that any person charged in any county with or convicted of a felony has previously been convicted of a felony in the commonwealth or a crime under the laws of any other state which if committed in the commonwealth would be a felony, it shall be his duty forthwith to report the facts to the district attorney of that county, who shall then file an information.

The purpose of H. 551 is to make the sentence meted out to a habitual criminal progressively more severe with each offense. Chapter 279, Section 25 now provides that the maximum sentence may be given to a habitual offender; but there is, at present, no provision whereunder a life sentence is required upon the conviction of a fourth felony offense. The proposed bill would require life imprisonment for the fourth conviction, thrice the maximum for the third conviction (or life), and twice the maximum for the second conviction.

The proposed bill also contains a provision allowing the “*re-sentencing*” of habitual criminals if it is found, after the original sentencing, that the convicted person had a previous felony conviction in this or some other jurisdiction. The defendant would be entitled to a jury trial on the issue of whether or not he was the same person charged with the prior conviction. Another provision would impose the duty on all law enforcement and correction officers to notify the district attorney if they discovered that a habitual criminal had not been given the maximum punishment.

Supporters of this type of sentencing procedure feel that it will serve as a deterrent to crime, and that it will protect the public from incorrigible criminals.

We do not recommend this change in the sentencing procedure.

We do not believe that it can be demonstrated that the existence of such a law has had the deterrent effect on crime for which its sponsors might hope. We further believe that under the present sentencing procedures and parole policies, the problem of the habitual criminal can be dealt with.

**AN ACT PROVIDING THAT SENTENCES OF PERSONS CONVICTED OF NONSUPPORT SHALL BE SERVED ON SUCCESSIVE WEEKENDS (H. 744)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1 of chapter 273 of the General Laws, as most recently amended by chapter 49 of the acts of 1957, is hereby further amended by inserting after the first sentence the following two sentences:—If any prison sentence is imposed by this section, sentence shall be served on successive weekends. For purposes of this section, a weekend will commence at six o'clock postmeridian on Friday and end at six o'clock postmeridian on Sunday.

By H. 744, it is proposed that persons convicted of non-support shall serve any sentence imposed on successive weekends from 6 P.M. Friday night until 6 P.M. Sunday night.

We are mindful that the purpose of this bill is to force reluctant fathers to earn some of the family income that may now be supplied by the welfare. Long experience in dealing with this type offense convinces us that the suggestion for weekend sentences is not practical. It is the task of the court, in this area, to use the penal institution only as a last resort. The object of the proceeding is to make the offender realize he must work in order to discharge his responsibilities. If this can be accomplished, there is no need for punishment in a house of correction.

For those who refuse to work, weekend sentences are not the answer. A man brought into court for non-support may well be an alcoholic or there may be other reasons for his predicament. Under no circumstances would it be appropriate to *require* such non-support offenders to serve weekend sentences.

We feel that if there is to be any experiment in the manner in which sentences are to be served, such experiments should come under the guidance of the parole board. The future operations of the correctional system may include partial leaves, custody of offenders only at night, and even weekend sentences; but we do not now recommend that such innovations be pioneered in the field of non-support.



## CRIMINAL RECORDS OF GOVERNMENT WITNESSES

By H. 2632, a new section 66A would be added to Chapter 277 which would provide:—

SECTION 66A. A defendant indicted for a crime punishable with death or imprisonment for life, upon demand made by him or his counsel upon the clerk, has the right to examine the criminal records, if any, of all government witnesses.

Under existing law, the prosecution has an advantage over the defense in the respect that the criminal records of any known witnesses for the defense are easily obtainable by the government. The reverse is not the case. There is now no practical method for the defense to obtain the criminal records of government witnesses. By criminal record, we mean the record of the conviction of a person which can be used against him after he has given his testimony in order to impeach his credibility as a witness. Such records are in the hands of the Commissioner of Probation. It is true that if the defense knew where a witness had been convicted, it would be possible to obtain the record of that conviction.

We do not recommend this bill.

We feel that if it is necessary in a capital case for the defendant to have the records of conviction of government witnesses for the purposes of discrediting their testimony, it is within the discretion of the trial judge to allow a motion by counsel for the defense to require the district attorney to produce such records upon such conditions as the trial judge deems fair and appropriate.

## AN ACT PROVIDING THAT A TRANSCRIPT OF GRAND JURY PROCEEDINGS BE AVAILABLE TO A DEFENDANT BEFORE TRIAL IN CAPITAL CASES (H. 2889)

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 221 of the General Laws is hereby amended by striking out section 86, as appearing in the Tercentenary Edition, and inserting in place thereof the following section:—

SECTION 86. A justice of the superior court may, in other than capital cases, upon the request of the district attorney, appoint a stenographer, who shall be sworn, and who shall take stenographic notes of such testimony given before the grand jury as he may direct, and shall provide him with a transcript fully written out of such part of said notes as he requires. In capital cases a justice of the superior court shall appoint a stenographer, who shall be sworn, and who shall take stenographic notes of such testimony given before the grand jury, and shall provide him with a transcript fully written out of such part of said notes as he requires. The defendant, on motion at any time before trial, shall receive a transcript fully written out of such part of said

notes as he requires. This section shall not authorize the taking of any statement or testimony of a grand juror.

By this bill, it is proposed that in capital cases a complete transcript of the proceedings of the grand jury be furnished to the defendant if he requests it or such part of it as he might request.

Persons indicted by a grand jury in a capital case have a right to challenge the indictment. If it is good in law, they face trial. The defendant has a right to know who appeared before the grand jury (*Commonwealth v. Locke*, 14 Pick. 485) upon motion for a list of witnesses. (See G. L. Ch. 277, § 9.)

The proof of the crime alleged in the indictment must be made out at the trial before the jury of twelve in the Superior Court. Presumably a grand jury transcript would indicate possible conflicts in statements of witnesses who testified there. There is no cross-examination before the grand jury; the prosecution presents evidence to convict.

We do not recommend the suggested change in our law which would permit the defendant, even in a capital case, to have the grand jury transcript.

### MATERIAL WITNESSES

Under the present law (Chapter 276, Section 49), it is provided:

"A witness who, when required, refuses to recognize either with or without sureties, shall be committed to jail until he complies with such order or is otherwise discharged. But if the court or justice find that the witness, unless he is the prosecutor or an accomplice is unable to procure sureties when so ordered, he shall, except in cases of felony, be discharged upon his own recognizance. Upon a complaint or indictment for a felony against a defendant not in custody, a material witness committed for failure to furnish sureties upon his own recognizance, may be held in custody for a reasonable time pending the pursuit and apprehension of the defendant."

By H. 2893 it is proposed to repeal the above provision and to substitute the following:

"Any witness who agrees to personally recognize to the court for his appearance as a witness against a prisoner shall not be committed to jail. Otherwise, he may be held in custody for a reasonable time pending the pursuit and apprehension of the defendant."

The proposed legislation (H. 2893) would also repeal or amend various other provisions of law which now authorize the court to require a material witness to give sureties if there is good cause to believe that he will not appear at the trial. (Chap. 276, Section 47.) The court may now require minors to recognize in the sum of \$50.00; this it is proposed to repeal. It is also proposed that the procedure for taking depositions from material witnesses who cannot furnish sureties (Ch. 276, Section 50) be repealed. Existing

law permits the court to order witnesses in juvenile cases under Ch. 119, § 52-64, to recognize, with or without sureties; but such witnesses may not be committed to jail unless there is a felony involved.

Our law provides that if a prisoner is admitted to bail or is committed, the court or justice shall bind by recognizance the material witnesses against the prisoner to appear and testify at the next sitting of the court having jurisdiction of the crime and in which the prisoner is held to answer. (Ch. 276, Sec. 45.) The question of sureties arises when there is a feeling that the witness may not appear. The proposals of H. 2893 would eliminate all sureties and terminate the practice of holding such persons in jail except during the period when the defendant is at large.

We would make the observation that in a great percentage of cases material witnesses are held for their own protection. Some who might conceivably furnish surety do not do so. We are mindful that some material witnesses, who very obviously cannot furnish surety, have been kept in jail for lengthy periods pending the trial.

Under Chapter 276, § 51, a procedure now exists for the release of material witnesses. The jailer must notify the chief justice of the superior court that such person is incarcerated. The district attorney is then required to advise the chief justice of the necessity for the continued incarceration of the material witness.

We cannot assume that a witness is kept in jail pending a trial without grave and sufficient cause. We can assume that the district attorney must satisfy the chief justice that such cause exists; and that it is not in the public interest to release such person.

We cannot see that there is any merit in the proposal to alter the existing statutory plan for the material witness. We do, however, feel that if the public interest demands that a material witness be kept in jail until trial, there should be some provision for advancing such cases for trial as speedily as possible without jeopardy to the rights of the defendant and without depriving the prosecution of the opportunity to properly prepare the case for trial.

## **JURISDICTION OF CERTAIN MOTOR VEHICLE CRIMES**

**"An Act Conferring Original Jurisdiction For Certain Crimes In The District Courts."**

**H. 1758**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:



§ 28 of chapter 266 of the General Laws is hereby amended by adding at the end thereof the following paragraph:—

“All complaints for violation of any provision of this section shall be brought originally in the district court within whose judicial district the violation takes place.”

We do not recommend this bill to give the district courts original jurisdiction of the various crimes covered by Chapter 266, § 28 of the General Laws.

Many of these offenses are of a serious nature. The maximum punishment for a violation of this section is now ten years in the State Prison.

There appears to be no substantial reason for divesting the Grand Jury and the Superior Court of jurisdiction over the several offenses involved here. In addition, there appears to be no reason why the penalty for these offenses should be decreased to a maximum of 2½ years in the House of Correction. Unless the maximum sentence for a violation of § 28 is reduced to 2½ years in jail as provided by Chapter 218, Section 27, we would have the most serious doubts as to the constitutionality of a bill such as this. (See: *Jones v. Robbins*, 8 Gray 329.)

### III. THE JUDICIARY

#### JUDGES AND ELECTIVE OFFICE

By H. No. 743, "No full time judge of any court of this Commonwealth shall at the same time, hold any elective office of the Commonwealth or any political subdivision thereof."

We do not recommend this bill.

We note that the Canons of Judicial Ethics of the American Bar Association (Canon 28) discourages members of the judiciary from engaging in "*partisan*" politics. We believe that judges should avoid all situations where there is any active participation in political activity. We have not found any instances where our Massachusetts judiciary has overstepped the established bounds. By tradition our judges avoid all party activity after joining the courts. We hope that this tradition will continue.

The proposal to ban all city and town offices to all judges raises the question as to whether a purely local unpaid position is of such moment in the affairs of the particular judge as to be inconsistent with the impartial discharge of his judicial duties. We can envisualize situations where local controversies may temporarily loom large in a small community. If judges of our District Courts accept positions which constantly involve them in controversy, we think prudence might dictate to them their course of action.

We think this decision is best left to the individual judge. We can observe that the judges of our higher courts, who must necessarily pass on municipal problems, rarely become local officeholders. Since we have not been made aware of any situation which we feel requires legislative action, we see no merit in this proposal at this time.

#### ADMINISTRATIVE AUTHORITY IN MULTIPLE JUDGE DISTRICT COURTS

By H. 1314, § 6 of Chapter 218 would be amended so as to more precisely spell out the prevailing practices in our district courts which have more than one justice. We recommend the bill (H. 1314).

The "new" provisions to be included in Section 6 would make it clear that the senior justice is the justice who is senior by reason of time of service.

The other "new" language to be inserted by the amendment would merely enact into law the existing procedure in the district courts whereunder the first justice is the administrative head of the court.

We, therefore, recommend the following draft act which is H. 1314.

#### DRAFT ACT

#### AN ACT PERTAINING TO THE ADMINISTRATIVE AUTHORITY IN MULTIPLE-JUDGE DISTRICT COURTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 6 of chapter 218 of the General Laws, as most recently amended by section 1 of chapter 744 of the acts of 1956, is hereby further amended by adding two sentences at the end of the first paragraph, so that said paragraph shall read as follows:—

Each district court other than the municipal court of the city of Boston shall have one justice, except that the central district court of Worcester, district court of Springfield, municipal court of the Roxbury district and first district court of eastern Middlesex shall have two justices each and the third district court of eastern Middlesex shall have three justices. The senior justice in time of service shall be the first justice of the court. Citations, orders of notice, writs, executions and all other processes issued by the clerk of the court shall bear the teste of the first justice thereof. The first justice shall be the administrative head of the court, and without limiting the foregoing, shall make all appointments of temporary clerks, of court officers and of probation officers, and shall approve appointments of assistant clerks and of temporary assistant clerks. When the first justice is absent and delay would injure the public interest, the justice next in seniority shall act in his place, and if no justice of the court is available, the chief justice of the district courts shall act.



## IV. JURY TRIAL AND JURORS

### ALTERNATE JURORS

During the course of the year, the Council was asked to consider amendment of Chapter 234, Sec. 26B, so as to permit the use of alternate jurors *after* the case goes to the jury.

Under present law, a panel of 14 may be selected. Two of this number must be dismissed when the jury of twelve is sent out to reach its verdict.

Considerable interest in the question of alternate jurors probably resulted from two federal court jury trials during the course of which a juror died or became otherwise incapable of further deliberation *after* the case had been submitted. In both cases a mistrial resulted.

The suggestion is that the alternate jurors be held in the custody of the court officers, presumably apart from the panel of twelve, so that one of them could be substituted at any time up to the time the verdict was reached.

A statute was passed in New York in 1958 (Title 6, Section 358A of the New York Code of Criminal Procedure) which appears to permit the court to substitute an alternate juror "who shall take the place of the discharged juror in the jury room and the jury shall then renew its deliberations with the alternate juror, who shall be subject to the same rules and regulations as though he had been selected as one of the original jurors."

We are inclined to feel that there are constitutional questions involved in any such amendment. We know that as a practical matter it would prove difficult to hold the twelve man panel in one place and the alternates in another. Facilities for this cannot now be provided. We doubt seriously that the injection of a new face into a panel which has been deliberating for more than a brief period would result in anything but confusion. In a criminal case, the defendant or either party in a civil case might well question the procedure on appeal as a tampering with his basic rights merely for the sake of expediency.

There being no real demonstration of the need of any such legislation, and there being very serious questions as to its constitutionality and practicality, we do not recommend that there be any change in the law to permit rearrangement of the jury after deliberations begin.

Our attention has been directed to the need to provide for more than two alternate jurors in a case which seems likely to be protracted. We recommend that Section 268 of Chapter 234 be

amended so as to provide for not more than *four* alternate jurors. We recommend the following:—

#### DRAFT ACT

Be it enacted, etc.:

SECTION 1. Section 26B of chapter 234 of the General Laws is amended by striking out the word “fourteen” wherever it appears and by inserting in place thereof the word “sixteen.”

SECTION 2. This law shall take effect on its passage.

#### AN ACT RELATIVE TO A PRISONER RECEIVING A LIST OF ALL JURORS IN THE POOL IN CERTAIN CASES (H. 2888)

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 277 of the General Laws is hereby amended by striking out section 66, as appearing in the Tercentenary Edition, and inserting in place thereof the following section:—

SECTION 66. A prisoner indicted for a crime punishable with death or imprisonment for life, upon demand by him or his counsel upon the clerk, shall have a list of all jurors in the pool at least fourteen days before trial and process to summon witnesses who are necessary to his defense, at the expense of the commonwealth.

#### LIST OF JURY POOL

H. 2888 would amend Section 66 of Chapter 277 so as to provide that the defendant in a capital case “shall have a list of all jurors in the pool at least fourteen days before trial.” Under present law it is provided that such defendant: “shall have a list of the jurors who have been returned . . . ”

In capital cases, it has been held in *Commonwealth v. Sacco*, 255 Mass. 369 that after the list of veniremen has been exhausted during the empanelling of a jury and the court causes jurors to be returned from the bystanders, it is not necessary to give the defendant a list.

Even if it were felt that the defendant were entitled to a list, it does not follow that such a list could be furnished in a capital case fourteen days before trial. In the murder case, a special panel of jurors is called for duty.

Section 26 of Chapter 234 governs the summoning of a jury for the trial of a capital case. This procedure differs from that employed for other cases under Section 25.

We do not believe that any amendment of Section 66, of the sort proposed, would be proved workable in practice. We do not believe

that the basic rights of the defendant in a capital case are impaired by the present statutory requirements. In a capital trial of magnitude, when jurors may be summoned on short notice and in large numbers, it would impair the orderly progress of the trial to require that the defendant have such lists.

We do not recommend this bill.

### **AN ACT PERMITTING JURY DUTY ON AN OPTIONAL BASIS FOR PERSONS OVER SEVENTY YEARS OF AGE (H. 2160)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 1 of chapter 234 of the General Laws, as most recently amended by section 1 of chapter 347 of the acts of 1949, is hereby further amended by striking out, in lines 17 and 18, the words "persons over seventy years of age;".

SECTION 2. Section 1A of said chapter 234, as most recently amended by section 2 of chapter 347 of the acts of 1949, is hereby further amended by adding at the end thereof the following paragraph:—

No person over the age of seventy years shall be required to serve as a juror unless he so desires.

H. 2160 would amend Sections 1 and 1A of Chapter 234 so as to permit persons over 70 years of age to serve as jurors. Such service would be permissive and not mandatory. We do not recommend this change in the law which now exempts those over seventy from jury service.

There is no particular reason why 70 is a magic age. Some jurors would be as keen at 70 as they were at 50. As a class, however, it appears in the best interests of the jury system to let things stay where they are. The parties on trial are entitled to have the jury see and hear all of the evidence. Defects in sight and hearing begin to show up as we get on in years. Having in mind that the jury is confined in close quarters for lengthy periods, and must often strain their faculties because of bad acoustics, lighting, or other conditions, we merely make the observation based on daily experience that the arbitrary age limit of 70 should be retained.

### **COMPENSATION OF JURORS**

By H. 2154, the compensation of traverse jurors and grand jurors would be increased from \$10.00 a day to \$15.00 a day. By H. 930, the compensation of grand jurors would be \$15.00 a day and that of jurors impanelled to try a case of first degree murder would be increased from \$12.00 to \$17.00 a day. The mileage allowance would be raised from 8 cents a mile to 10 cents a mile.



The expense for jurors (including travel, etc.) for the various counties for the year ending June 30, 1963, was as follows:

Suffolk .....	\$107,217.48
Barnstable .....	13,928.92
Berkshire .....	11,447.93
Bristol .....	46,497.95
Dukes .....	1,902.51
Essex .....	60,719.22
Franklin .....	18,907.89
Hampden .....	30,634.72
Hampshire .....	11,921.20
Middlesex .....	132,072.90
Nantucket .....	1,302.10
Norfolk .....	80,283.44
Plymouth .....	61,886.20
Worcester .....	63,325.92
<b>TOTAL .....</b>	<b>\$642,048.38</b>

If the jury fee was increased 50%, we would point out that the expense would soar. We do recommend that the fee of the jurors engaged in first degree murder cases be increased, but we would leave the amount of the increase to the General Court. A 2 cent increase in the mileage allowance is not unreasonable if the legislature feels it is wise.

Should the General Court find it appropriate to provide for a modest jury fee, (which we have suggested in the past) we feel that the compensation of jurors could be increased because of the additional revenue which would be produced by the jury fee. We have previously suggested a jury fee of \$15.00 to be paid at the time the case is entered.

#### DRAFT ACT

Section 25 of chapter 262 of the General Laws, as most recently amended by chapter 435 of the acts of 1960, is hereby further amended by striking out the first sentence and inserting in place thereof the following sentence:

The compensation of traverse jurors impanelled to try cases of murder in the first degree shall be \_\_\_\_\_ dollars, and that of all other traverse jurors and of grand jurors ten dollars, for each day's service.

## V. JUVENILE COURTS AND OFFENDERS

### RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO A TEEN-AGE JURY SYSTEM (H. 191)

Resolved, That an unpaid special commission, to consist of two members of the senate, three members of the house of representatives and two persons to be appointed by the governor, is hereby established for the purpose of making an investigation and study relative to the advisability of establishing a teen-age jury system, so called, as currently used in Jacksonville, Florida, for the purpose of assisting members of the judiciary in cases involving juveniles accused of misdemeanors.

\* \* \* \* \*

The Council has made inquiries into the practicality of using a "*teen-age*" advisory jury in juvenile cases. The purpose of such a "*jury*" is to exercise a moral influence on the juvenile offender by having a picked group of his "*peers*" present when his case is heard or disposed of. None of the juvenile authorities interviewed seem to believe that the introduction of such a practice would be appropriate. We feel that under the present statute governing the procedure in the juvenile sessions, such a jury is forbidden, and we do not recommend any change in this law (Ch. 119, Section 38). We believe that our juvenile court judges, with the assistance of the probation officers and others who have experience and training to fit them for their role, are far more qualified to decide upon the proper disposition of the case than any group of youngsters. We feel that "*teen-age*" juries might have some place in the school systems and in community affairs, but there is no place for this well-intended idea in the judicial system of the Commonwealth of Massachusetts.

### PARENT, ETC., AIDING DELINQUENCY OF CHILD

By H. 1526, it would be provided that any person who shall be found to have caused, induced, abetted, encouraged, or contributed toward the waywardness or delinquency of a child, or to have acted in any way tending to cause or induce such waywardness or delinquency, may be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year or both.

We recommend this bill. The present penalty is a fine of not more than fifty dollars or imprisonment for not more than six months.

We recommended this increase in penalty in our 34th report, and we continue to urge a stiffer penalty for those who help pave the

way which brings the child before the juvenile court. We think it will prove of assistance to the juvenile courts to have the authority to mete out a more severe punishment. We do not know of any more serious offense in our society than that of leading a child into criminal activity. When it is the parent or guardian who leads the way, the breakdown of the family is complete.

#### DRAFT ACT

Section 63 of chapter 119 of the General Laws, as appearing in section 1 of chapter 95 of the acts of 1932, is hereby amended by striking out, in lines 6 and 7, the words "fifty dollars or by imprisonment for not more than six months," and inserting in place thereof the following words:—five hundred dollars or by imprisonment for not more than one year or both.

### CONTEMPT PROCEDURE FOR FAILURE TO COMPLY WITH ORDER OF PAYMENTS

The following is Section 1 of H. 1946 which was referred to the Council again this year:

SECTION 1. Section 58 of chapter 119 of the General Laws, as most recently amended by chapter 385 of the acts of 1948, is hereby further amended by adding at the end thereof the following sentence:—Where the parent, guardian or other person fails to carry out the order of payment the court, on petition by the person or agency aggrieved, after notice, may cite such parent, guardian or other person to appear and show cause why such person should not be adjudged in contempt of the court's order, and after a hearing of the contempt citation may sentence the parent, guardian or other person to imprisonment until the order is complied with, but not for more than one year.

We recommend this bill.

In our 32nd Report in 1958, we recommended this legislation which continued to have the support of the late Judge John J. Connelly of the Boston Juvenile Court thereafter.

Under the existing provisions of Chapter 119, § 58, it is provided that the court may make an order for payment by the parents or guardian or other person responsible for the care and support of the child. This payment is made to the institution, department, division, organization, or persons furnishing the care and support.

No order for payment of money may be made until the parents or others responsible shall have "been summoned before the court and given an opportunity to be heard." It is further provided that the court may modify the order.

There is now no specific provision under which the parents or other responsible persons can be adjudged in contempt, if they fail to pay.

We might note that if a parent refused to support his child, in



the ordinary situation, the probate court or the district court would make short work of the matter. If an order for support of the probate courts is disregarded, the offender may be quickly cited for contempt.

Our law also has provisions under which the relatives of persons in state institutions may be ordered to make payments for support.

We would point out also that the money for the support of children, who are adjudged as delinquent and committed, must either come from the parents or others responsible or from the taxpayers of the Commonwealth.

We again recommend the enactment of this necessary legislation. We feel that if the parents cannot make support payments, the judge will not make an order with which they cannot comply.

We do not recommend H. 1527 which seeks to accomplish the same result as H. 1946 because H. 1527 does not contain the safeguard we find in H. 1946.

### **LIMITED PARENTAL LIABILITY FOR INTENTIONAL TORTS OF CHILDREN**

Several bills were referred to the Council again this year which would impose financial liability on the parents of children who commit acts resulting in personal injury and property damage to others. We considered this type of legislation in our 34th Report (1958) at page 20. The proposals fall into two main groups. One suggestion is that, as a condition of probation in a juvenile case, the child or his parents, or both, make restitution or reparation to the injured party in a limited amount. The juvenile judge would inquire into the ability of the parents to make such restitution and would, in the appropriate case, require them to pay up to \$300 as a partial reparation to the person who was injured or damaged by the unlawful conduct of the child. We have previously said that a requirement that the child make restitution (rather than the parent) has been proven to be impractical. We again recommend that Chapter 119 be amended by adding a new section to allow the juvenile court to require parents to stand at least some of the financial losses which result from the actions of their children.

The other suggestion would create a new form of tort action which would clearly make parents liable for all damages resulting from a "malicious or willful act" done by their minor child under 18. We do not recommend this concept.

We think that under the decision in *Caldwell v. Zaher*, 344 Mass. 590, a parent is presently liable in a tort action for certain actions of his child. In this case, the court held that where it was alleged that the parents knew of the dangerous propensities of their child,

and had taken no steps to restrain those propensities, a cause of action for damages existed. The court said:—

“We are of the opinion that in circumstances like the present a parent is under a duty to exercise reasonable care to prevent his minor child from inflicting injury, intentionally or negligently on others. This duty of parental discipline arises when the parent knows or should know of the child’s propensity for the type of harmful conduct complained of and has an opportunity to take reasonable corrective measures.”

If the parents know that the child has a habit of assaulting people, they may be negligent for their failure to curb this form of misconduct.

The total amount received by the Probation Department of the Boston Juvenile Court for “Restitution” between 1935 and 1944 was \$1,617.29. The total amount received in the next ten year period between 1945 and 1954 was \$12,427.83.

The following table shows the amounts received in the period of 1955 through 1963:

<i>Year</i>	<i>Restitution</i>
1955 .....	1,345.15
1956 .....	2,159.61
1957 .....	1,427.26
1958 .....	2,184.56
1959 .....	1,070.93
1960 .....	1,178.09
1961 .....	1,616.40
1962 .....	1,313.16
1963 .....	2,586.52
	<hr/>
	14,881.78

It is estimated that “Restitution” during the period 1955 to 1963 might have been at least three times the amount which was actually paid. There are many reasons for the inability of the Juvenile Court to collect adequate “Restitution.” The draft act which we propose now and have already proposed in 1958 will do something towards the strengthening of the ability of the Probation Department of the Juvenile Courts to collect additional sums from the parents of juvenile offenders.

It will aid the juvenile courts in their ceaseless quest to force parents to assume responsibility for their children if, in a proper case, the court has power to oblige such parents to *pay* for some of the damages.

We recommend the following:

DRAFT ACT

Chapter 119 is hereby further amended by inserting after section 62 the following section:—

§ 62A. If, as provided for in section sixty-two, the court determines that restitution or reparation should be made to the injured party and the court finds cause the court may order that the parents make restitution or reparation to the injured person to such an extent and in such sum as the court may determine, not exceeding three hundred dollars. No order for the payment of money shall be entered until the parents, by whom payments are to be made, shall have been summonsed before the court and given an opportunity to be heard. If the payment is not made at once, it shall be made through the probation officer who shall give a receipt therefor, keep a record of payment, pay the money to said injured person, and keep on file his receipt therefor.

\* \* \* \*

We do not recommend H. #1529, and we do not recommend either H. 2143 or S. 180. The latter two bills would create a new action of tort without limits as to amounts.



## VI. MOTOR VEHICLE LAW

### CHEMICAL AND BLOOD TESTS FOR "DRUNKEN DRIVING"

The following Bill H. #1319 was referred to the Council:

AN ACT MODIFYING EXISTING PROCEDURES RELATING TO THE ADMINISTRATION OF CERTAIN CHEMICAL TESTS DESIGNED TO MEASURE INTOXICATION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 24 of chapter 90 of the General Laws is hereby amended by striking out paragraph (1) (e) added by chapter 340 of the acts of 1961 and inserting in place thereof the following paragraph:—

(1) (e) In any prosecution for a violation of paragraph (1) (a) of this section, evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, (1) the results thereof were made available to him upon his request, and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him. (2) Such chemical test or analysis shall be given only when a police officer has reasonable grounds to believe a person was operating a motor vehicle while under the influence of intoxicating liquor. Whoever, upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle shall be deemed to have consented to undergo such a chemical test or analysis, unless he specifically, at the time of and before such a chemical test or analysis is conducted, makes a statement or refusal to undergo such a test or analysis. If such a statement of refusal is made by such a person, the chemical test or analysis shall not be given. In such a case, however, the police officer to whom such statement of refusal was made shall prepare a report, stating that a police officer, who shall be named in said report, has reasonable grounds to believe that the arrested person was operating a motor vehicle under the influence of intoxicating liquor and that, upon request, the arrested person refused to submit to such chemical test or analysis. This report shall be signed by the police officer to whom the statement of refusal was made and endorsed by the head of the department or by a person authorized by the head of the department and shall immediately be delivered or mailed to the registrar. Upon receipt of such report, the registrar shall suspend the license to operate of such person in accordance with the provisions of section twenty-two. The registrar, after having suspended the license of such person, shall not reissue the license to such person until six months after the date of said suspension. Blood shall not be withdrawn

from any person for the purpose of any such test or analysis except by a physician. If such evidence is that such percentage was five one hundredths or less, there shall be a presumption that such defendant was not under the influence of intoxicating liquor; if such evidence is that such percentage was more than five one hundredths but less than ten one hundredths there shall be no presumption; and if such evidence is that such percentage was ten one hundredths or more, there shall be a presumption that such defendant was under the influence of intoxicating liquor.

It appears that the principal purpose of this bill is to amend the present law so that any person who operates a motor vehicle on the highways of Massachusetts shall be deemed to have consented *in advance* to a blood test or chemical test to determine whether or not he is legally intoxicated.

The consent of the defendant to such blood tests or chemical test would no longer be required.

It appears that the refusal of such defendant to allow a blood test or chemical test would, if this bill were passed, be admissible evidence against him.

It also appears that failure to submit to the test would result in an automatic suspension of the operator's license for six months at least.

Another new element to be added to our law by this bill is the provision that such blood tests or chemical tests shall be given only when a police officer has reasonable grounds to believe a person who is operating a motor vehicle while under the influence of intoxicating liquor. Under this provision, it appears to us that anyone could be given this blood test or chemical test on the mere suspicion of one police officer that his drinking affected his driving.

We do not recommend this bill.

There is already a statutory provision allowing chemical tests and blood tests by Chapter 90 § 24 (1) (e). We do not think that the suggested amendment will improve the administration of justice in this type of case.

### **"DRIVING TO ENDANGER"**

It was sought by H. 934 to amend Chapter 90, Section 24 (2) (a) by establishing a new test or definition of the offense which is commonly known as "Driving to Endanger."

The present provision reads:—

"Whoever . . . operates . . . a vehicle negligently so that the lives or safety of the public might be endangered. . . ."

The amendment proposed would read:—

"Whoever . . . operates . . . a motor vehicle . . . grossly or in a negligent manner so that the lives and safety of the public might be endangered. . . ."

We do not recommend this amendment. One cannot operate a motor vehicle "grossly" and the rearrangement of the present wording of the statute adds nothing but confusion.

This section of Chapter 90 has been the subject of many attempts at revision. Ultimately it is for the General Court to decide whether, in order to permit a conviction for "Driving to Endanger," there should be a requirement that the government must prove more than ordinary or simple negligence. At present, there is no necessity to find the defendant guilty of *gross* negligence in order to obtain a conviction. The various suggestions in connection with this statute seem to boil down to the proposition that many feel that *gross* negligence should be shown in order to convict. There is an equally vociferous faction which holds that the statute is adequate as it stands and that the judge or the jury can arrive at the right decision under the present law. We can only point out that the decision of this issue is clearly a matter of legislative policy. Bills to amend this particular section are likely to continue to be filed and the General Court should judge them in light of the comments set forth above.

## **DEPARTMENT OF PUBLIC WORKS TO BE GIVEN AUTHORITY TO MAKE PARKING FINES FOR STATE HIGHWAYS**

### **AN ACT ALLOWING THE DEPARTMENT OF PUBLIC WORKS TO ESTABLISH A SCHEDULE OF FINES FOR PARKING VIOLATIONS ON STATE HIGHWAYS.**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 20A of chapter 90 of the General Laws as amended by section 1 of chapter 786 of the acts of 1962 is hereby amended by adding in line one, after the word "except," the words:—on state highways and.

SECTION 2. Said chapter 90 is hereby amended by striking out the first paragraph of section 20C, inserted by section 6 of chapter 786 of the acts of 1962 and inserting in place thereof the following:—

SECTION 20C. On all state highways, in the cities of Boston and Cambridge and in any city or town which accepts the provisions of this section it shall be the duty of every police officer who takes cognizance of a violation of any provision of any rule, regulation, order, ordinance or by-law regulating the stopping or parking of motor vehicles established for their respective city or town or by the department of public works for state highways, forthwith to give the offender a notice, which shall be in tag form as provided in this section, to appear before the clerk of the district court having jurisdiction, at any time during office hours, not later than twenty-one days after the date of such violation. All tags shall be prepared in triplicate and shall be pre-numbered.

SECTION 3. Said section 20C of chapter 90 is hereby further amended by inserting after the fifth paragraph the following paragraph:—

The department of public works shall, from time to time, establish by rule or regulation a schedule of fines for offenses subject to this section committed within the limits of any state highway.

\* \* \* \*

This bill would amend section 20A by changing the first sentence to read:

It shall be the duty of any police officer, except *ON STATE HIGHWAYS AND* in cities and towns subject to the provisions of section 20C, who takes cognizance of a violation of any provision of any rule, regulation, order or by-law regulating the parking of motor vehicles established by any city or town or by any commission or body empowered by law to make such rules or regulations therein, forthwith to give to the offender a notice to appear before the clerk of the district court having jurisdiction . . . etc.

This section 20A is intended to permit the non-criminal disposition of parking offenses. The penalties for the violation of parking offenses as stated by section 20A are as follows:—

FIRST OFFENSE (calender year) . . . . .	NO FINE
SECOND TO FIFTH inclusive . . . . .	\$1.00
SIXTH and subsequent offenses . . . . .	\$2.00

Thus under existing law, the person who parks his vehicle on a state highway is now subject to the fines as above mentioned. The Department of Public Works has no authority to provide some different set of fines or other dispositions for these offenses. By amending Section 20A as proposed by this bill (H. 77), the non-criminal disposition of parking offenses on state highways by the imposition of the above schedule of fines would cease.

The further provision of the bill amends section 20C by adding to the list of regulatory authorities over parking the name of the *department of public works*.

The effect of this change would be to enable the department of public works to establish a schedule of fines such as has been established in Boston, Cambridge, and elsewhere. The fines for parking violations would be not more than FIFTEEN DOLLARS for each offense instead of the present maximum of TWO DOLLARS for each parking offense on a state highway.

We assume that the suggested legislation has the support of the department of public works on the basis that it will assist in keeping state highways clear for travel and that legislation is necessary for such purpose.

We would point out that the enactment of this amendment to Chapter 90 would make it more expensive to park overtime on a



state highway passing through the center of Northampton than it would be to park overtime on a side street in the same town. Two different sets of rules would apply in the same community. One would be set under Sec. 20A, and the set of rules for state highways would be set under Section 20C. One culprit would pay \$2.00 while another just around the corner would pay up to \$15. There is no doubt that such an amendment would take away local control over parking.

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## VII. STATUTE OF FRAUDS

### TESTAMENTARY DISPOSITIONS UNDER THE STATUTE OF FRAUDS

Under the existing § 5 of Chapter 259 of the General Laws it is provided as follows:

“§ 5 Agreement to Make a Will, etc., to be in Writing—No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding unless such agreement is in writing signed by the persons whose executor or administrator is sought to be changed, or by some person by him duly authorized. . . .”

Two proposed amendments of this section have been suggested. Both suggestions would add language which would make the statutory requirement of a written agreement applicable to agreements “to revoke or not revoke” a will, codicil, legacy, bequest, or devise or to refrain from making a will, codicil, legacy, bequest or devise.

The distinction between the two proposed bills (§ 219 and § 220) is that in the former the agreement in writing must be signed by:

“either the person who is sought to be charged or the decedent whose executor or administrator is sought to be charged, or by some person *duly authorized by a writing signed* by such person or decedent.”

H. 220 would not require that there be written and signed proof to show that the person involved here had given authority to some other person to act under the conditions covered by the statute.

The present statute has stood since 1888. It is pointed out to us by Franklin C. Cunningham Esquire, of the Boston Bar, (the petitioner who sponsored both § 219 and 220) that it had been the opinion of the bar that § 5, as it now stands, required a written agreement if it was proposed to prove that there had been an agreement *not* to revoke a will. (See: *West v. Day Trust Company*, 328 Mass. 381.)

Mr. Cunningham reports to us that in 1963 the Circuit Court of Appeals for the First Circuit held in *Foman v. Davis*, 316 F. (2d)

254, 256 that § 5 of Chapter 259 does not apply to oral agreements to die intestate, and that such oral agreements may be enforced.

There is an apparent uncertainty at the present time as to what types of testamentary dispositions, including dispositions which are altered after an agreement which rules out any revocation or change, are required to be in writing under the statute which is designed to prevent frauds and perjury.

It is the aim of the proposed legislation to require that those who wish to express their intent to make a will, or a devise or a legacy, or to agree *NOT* to make, revoke, change a will, shall sign a written agreement to give their intent legal effect.

We recommend that this be done. We further recommend that H. 219 be enacted and thus indicate that we prefer that there must be written authority given to any person who has been authorized to bind another in regard to the disposition of his estate.

The enactment of the amendment would not prevent persons who had rendered services or conveyed property in reliance on an oral agreement from recovery of the fair and reasonable value of the services rendered or the property conveyed. Nothing should be done to prevent a just claim in *quantum meruit*. Many there will always be who will render services, in particular, in reliance upon an oral agreement. While such persons are not permitted to avoid the requirements of the statute of frauds, the injustice of preventing them from recovery of the fair value of what they have given is obvious.

We, therefore, recommend the following which is S. 219:

#### DRAFT ACT

#### AN ACT TO CLARIFY THE STATUTE OF FRAUDS WITH RESPECT TO TESTAMENTARY DISPOSITIONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 5 of chapter 259 of the General Laws is hereby amended by striking out the same in its entirety and substituting therefor the following:

SECTION 5. No agreement to make a will of real or personal property or codicil thereto or to give a legacy, bequest or devise, or to revoke or not to revoke a will, codicil, legacy, bequest or devise, or to refrain from making a will, codicil, legacy, bequest or devise or any other agreement about making or not making a will, codicil, legacy, bequest or devise, shall be binding unless such agreement is in writing and signed by the person whose executor or administrator is sought to be charged, or by some person duly authorized thereunto by him in writing.

SECTION 2. Chapter 259 of the General Laws is hereby further amended by inserting after section 5 thereof as amended by section 1 of this act the following:

SECTION 5A. Section 5 of this chapter shall not apply to any agreement made prior to May seventeenth, eighteen hundred and eighty-eight, and any agreement made between that date and October first, nineteen hundred and sixty-five shall be governed by said section 5 as it existed prior to the enactment of this section.

SECTION 3. This act shall take effect upon October 1, 1965.

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## VIII. TORT LIABILITY

### AN ACT ESTABLISHING THE LIABILITY OF THE COMMONWEALTH AND ITS POLITICAL SUBDIVISIONS IN ACTIONS OF TORT (H. 2894)

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 34 of the General Laws is hereby amended by inserting after section 1 thereof the following section:—

SECTION 1A. The counties shall be liable in an action at law for the torts of their officers, whether elected or appointed, and their employees committed within the scope of their official duties or employment.

SECTION 2. Chapter 40 of the General Laws is hereby amended by inserting after section 1 thereof the following section:—

SECTION 1A. Cities and towns shall be liable in an action at law for the torts of their officers, whether elected or appointed, and their employees committee within the scope of their official duties or employment.

SECTION 3. Section 1 of chapter 258 of the General Laws is hereby amended by adding at the end thereof the following paragraph:—

The commonwealth shall be liable in an action at law which may be commenced in the district courts or the superior court for the torts of its officers, whether elected or appointed, and its employees committed within the scope of their official duties or employment, and any judgment entered against the commonwealth in such an action shall be paid in the manner provided by section three of this chapter.

SECTION 4. Chapter 258 of the General Laws is hereby amended by striking out section 3, as most recently amended by chapter 518 of the acts of 1951, and inserting in place thereof the following section:—

SECTION 3. If final judgment or final decree is entered in favor of the petitioners, plaintiff or parties other than the commonwealth, the clerk of the court where such judgment or decree is entered, shall within seven days after the final disposition of the case, transmit a certified copy of the docket entries and a certificate of such judgment or entry of such decree showing the amount due from the commonwealth, to the comptroller who shall notify the governor, shall draw his warrant for such amount on the state treasurer,

who shall pay the same from any appropriation made for the purpose by the general court.

We do not recommend this bill which would, we believe, immediately and completely abolish the doctrine of sovereign immunity on the part of state, county, city and town governments.

It is the position of those who sponsor this legislation that the existing indemnification procedures such as those in Chapter 12, Sec. 3B; Chapter 16, Sec. 4C; and Chapter 41, Sec. 100A; cover only a "fraction of the possible liability-creating situations" and that recovery is by no means sure or adequate in every instance.

We think that a governmental tort liability statute, with proper safeguards, would be worth the further consideration of the legislature. The proposed statute has no adequate provisions to protect the public at large. Whatever the merits of a tort liability statute might be, we are convinced that this proposed bill goes too far.

**RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO AUTHORIZING HUSBANDS AND WIVES TO SUE EACH OTHER IN ACTIONS OF TORT (H. 3138)**

Resolved, That the judicial council be requested to investigate the subject matter of current house document numbered 3118, relative to authorizing husbands and wives to sue each other in actions of tort, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

**LAWSUITS BETWEEN HUSBAND AND WIFE (H. 3118)**

**An Act Authorizing Husbands and Wives To Sue Each Other In Actions Of Tort**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 209 of the General Laws is hereby amended by striking out section 6, as amended by section 2 of chapter 765 of the acts of 1963, and inserting in place thereof the following section:—

SECTION 6. A married woman may sue and be sued in the same manner as if she were sole.

\* \* \* \*

It was the traditional view that a husband and wife are one. Suits by the husband against the wife were ill-favored for many reasons not the least of which was the opportunity for collusion.



The simple situation of the common law made it incongruous for a wife to sue her husband if he ran her down with a coach and six, or even a blooded stallion. Not only did the husband have to provide the wife's necessities, but he probably did not carry liability insurance for such family tragedies.

In these days there is still reason to discourage tort suits between husband and wife who are living together as a family unit. The opportunities for fraud are obvious. The inter-spousal litigation would also play havoc with family peace.

In our experience, inter-family tort suits are now sufficiently perplexing to make us adopt a course of extreme caution. We might mention the automobile passenger cases which, under our law, now require proof of gross negligence against the operator if the passenger is to recover from him. In dealing with such cases where members of the same family are involved, we feel that the perspicacity of Diogenes is hardly sufficient.

We do think that there could be tort cases where it was unfortunate that the wife could not sue her husband. If unknown to the wife, the husband crashed his dump truck into the side of a bus in which she was riding and assuming no negligence on the part of the bus company, it would be difficult to argue that, at least in this case, it was unreasonable to allow the wife to sue for her injuries. However, this is the exception, not the rule.

Because of the increasing prevalence of marital disunity, we feel the time has come to take a step in the direction of inter-spousal litigation which we have not taken before. We feel and we recommend that if in fact spouses are separated from each other and are no longer living together as a family unit, whether there is a decree of court or not, the spouses should be able to sue and be sued by the other in tort.

Section 6 of Chapter 209 now permits suits in contract as defined in Section 2.

We recommend the following:

#### DRAFT ACT

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 209 of the General Laws is hereby further amended by adding the following section:—

SECTION 6A. A married woman may sue her husband and be sued by him in tort in the same manner as if she were sole, provided that she is actually living apart from her husband at the time the cause of such tort action accrued.

**AN ACT ESTABLISHING LIABILITY FOR INJURIES CAUSED TO CHILDREN AS THE RESULT OF THE EXISTENCE OF ATTRACTIVE NUISANCES, SO CALLED (H. 2641)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

Chapter 231 of the General Laws is hereby amended by inserting after section 85E, as added by chapter 300 of the acts of 1959, the following section:—

SECTION 85F. Any person who creates a condition dangerous to children under the age of twelve, upon his own land or upon the land of another, or permits such a condition to remain after he knew or should have known of its existence, and he knew or should have known that such condition would attract children of tender years, shall be liable in tort for damages for injury to the person or property of such children resulting from such condition; notwithstanding that at the time of said injury said child may have been a trespasser.

We do not recommend this bill which would establish the “Attractive Nuisance” doctrine in Massachusetts.

Under the present law, a landowner owes a duty to an infant trespasser or licensee to abstain from wanton or reckless misconduct. “The essence of wanton or reckless conduct is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another.” (*Com. v. Welansky*, 316 Mass. 383, 397-401)

The effect of this bill would tend to make the owner of land an insurer and impose liability on him regardless of the degree of fault.

None of the safeguards contained in Section 399 of the *Restatement of Torts* (or in the proposed revision now being considered) is included in the proposed bill.

**AN ACT RELATIVE TO THE LIABILITY OF THE OWNERS OF CERTAIN PREMISES UPON WHICH PERSONS HAVE ENTERED FOR THE PURPOSE OF HUNTING OR FISHING (H. 2903)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 231 of the General Laws is hereby amended by inserting after section 85E, as added by chapter 300 of the acts of 1959, the following section:—

SECTION 85F. Any person who enters the premises of another, without the payment of consideration, for the purpose of hunting, fishing, trapping,

camping, water sports, hiking or sightseeing, and who is injured upon proof of the wanton, wilful or reckless misconduct of the owner or person in control of said premises. Any such person who has paid consideration as a condition to permission granted to enter such premises and is so injured, shall be entitled to recover damages upon proof of the negligence of the owner or person in control thereof.

We do not recommend this bill.

We have ascertained that the intent of those who sponsored this bill is not reflected in the version which was printed as H. 2903. Because the bill, as filed, does nothing but restate general principles of existing law, we do not think such legislation is meaningful. Should the proponents of legislation which would make landowners more willing to allow the use of their land for hunting and outdoor activities file new legislation, we would be willing to consider the practical legal problems involved.

\* \* \* \* \*

**AN ACT EXEMPTING REGISTERED PHYSICIANS FROM CIVIL LIABILITY FOR EMERGENCY CARE OR TREATMENT RENDERED TO PERSONS ATTENDING A PUBLIC GATHERING (S. 185)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 112 of the General Laws is hereby amended by striking out section 128, inserted by chapter 217 of the acts of 1962, and inserting in place thereof the following section:—

SECTION 128. No physician duly registered under the provisions of section two or two A who, in good faith, renders emergency care or treatment at the scene of an accident to any person injured on the highway or to any person attending a public gathering, shall be liable in a suit for damages as a result of his acts or omissions, nor shall he be liable to a hospital for its expenses if, under such emergency conditions he orders a person hospitalized or causes his admission.

**AN ACT EXEMPTING CERTAIN MEMBERS OF RESCUE UNITS FROM CIVIL LIABILITY FOR FIRST AID TREATMENT ADMINISTERED AT THE SCENE OF AN ACCIDENT TO PERSONS INJURED IN MOTOR VEHICLE ACCIDENTS (S. 749)**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 128 of chapter 112 of the General Laws, as amended by chapter 59 of the acts of 1964, is hereby further amended by adding the following paragraph:—No person who is a member of a rescue unit of a fire or police de-

partment or of any other rescue unit, private or public, and who holds an accredited Red Cross first aid certificate shall be liable in a suit for damages as a result of any act or omission in administering, in good faith, first aid treatment at the scene of an accident to any person injured on the highway as the result of a motor vehicle accident or in transporting the victim of such accident.

### **LIABILITY OF PHYSICIANS AND OTHERS RENDERING EMERGENCY TREATMENT**

S. 185 is an Act extending the exemption of physicians and surgeons from civil liability for emergency care or treatment in certain situations. The so-called "Good Samaritan" law.

Senate 749 would extend the exemption still further to members of rescue units of fire or police departments and to persons holding accredited Red Cross first-aid certificates.

There has been some talk that doctors present at the scenes of accidents have declined to render first aid to persons injured for fear that they might become liable to lawsuits and heavy damages. To us it seems that the risk is slight, and we would suppose that in most instances the professional instinct of the doctor would lead him to give such aid as he could without thought of consequences. Still, it cannot be said that there is no possible risk. A physician is ordinarily held to a very high standard of duty, and especially if he lives in another state, he cannot be expected to know just what liability he might incur in this Commonwealth. Accordingly by C. 217 of the Acts of 1962, the General Court granted immunity from liability to physicians duly registered under sections 2 and 2A of Chapter 112 of the General Laws. By Chapter 59 of the Acts of 1964, protection was extended to physicians resident in "another state."

But this immunity was limited to instances of care or treatment of a person injured as the result of a motor vehicle accident on a highway.

We think the principle of these acts is sound, but it is obvious that the acts do not include all instances to which the principle would seem applicable. Senate 185 now referred to us would extend the immunity to instances of persons "attending a public gathering." But even this does not seem to us sufficiently broad. It would still leave many instances uncovered. Cases that readily come to mind are those of persons injured at a fire, of drowning persons, of choking, of heart failure, and doubtless there are many others. We think it would be better to enact a more comprehensive law than it is to amend this section every time a new instance comes to light.

Furthermore, it seems to us that immunity ought not to be lim-



ited to physicians registered in this commonwealth or in another state. It will sometimes happen that the only qualified person available is a physician or surgeon authorized to practice in some Canadian Province. These jurisdictions also have laws designed to secure competent practitioners.

We do not favor further extension since criteria of qualifications are usually lacking and other persons are not held to the standards of physicians and surgeons and liability for errors of judgment on their part is very unlikely. For this reason we do not recommend Senate 749.

We recommend the following:

### DRAFT ACT

An act exempting physicians and surgeons from civil liability for necessary care or treatment rendered in cases of immediate emergency.

Be it enacted, etc., as follows:

Chapter 112 of the General Laws is hereby amended by striking out section 12B inserted by Chapter 217 of the acts of 1962 and amended by Chapter 59 of the acts of 1964 and inserting in place thereof the following section:

SECTION 12B. No physician or surgeon duly authorized to practice in this Commonwealth, in any other state of the United States, in the District of Columbia or in any of the Canadian Provinces who, in good faith, renders to any person immediately necessary care or treatment at the scene of an accident on the highway, or in any other emergency, or at a public gathering, shall be liable in a suit for damages as a result of his actions or omissions, nor shall he be liable to a hospital for its expenses if, under such emergency conditions, he orders a person hospitalized or causes his admission.

## IX. TRUST FUNDS FOR THE CONSTRUCTION INDUSTRY

### CONTRACTOR'S "TRUST FUNDS"

H. 2897 of 1964 is a bill identical with S. 116 which was filed in the 1963 General Court on petition of the "Associated Subcontractors of Massachusetts." The purpose of this legislation is to protect subcontractors and others who perform labor and furnish materials in the erection, alteration, or repair of any structure or improvement of real estate. The plan also applies to public improvements. The following is a brief summary of the very lengthy provisions of H. 2897:—

#### OPERATION OF THE PLAN

If the owner of real estate receives funds for the payment to a contractor in return for "improvements," such funds would be impressed with a trust which would be a separate trust fund to be held by such owner or by a contractor, or sub-contractor as trustee.

#### PURPOSE

The purpose of these trusts would be to assure payment to the person or persons who perform the labor or furnish the materials or services.

The corpus of a trust of which the owner was trustee would include any proceeds of construction money, construction loans, proceeds of the sale of real estate upon which the improvement was made, assignments of future rents, and assignments of insurance.

The corpus of a trust of which a contractor was trustee would consist of funds received under a contract, funds assigned thereunder, and proceeds of casualty insurance.

The corpus of the trust of which a subcontractor is trustee are funds received under the subcontract, funds assigned thereunder, and insurance proceeds.

#### BENEFICIARIES

The "beneficiaries" of these trusts would be those who perform the labor, furnish the materials, or perform professional services. Legal services are not included. In addition, the trust fund would be applied to pay income taxes, unemployment insurance, employer contributions, union assessments, insurance premiums and bond premiums.

If the Trustee diverts any of the assets of the trust he would be guilty of diversion.

A "Notice of Lending" feature is included under which a trustee could show that a transfer was not a "Diversion" because it was really an advance within the scope and purpose of the trust. Under this the owner or contractor

could lend money (after filing the NOTICE with the secretary of state) and gain protection or establish a defense.

There is no measure or standard as to what "lending" would be proper.

The Trustee could decide the time and method of payment. Provisions are included for detailed record keeping and the "beneficiaries" have a right to examine the records. Failure to keep records would be a presumption of larcenous intent.

### ACTIONS TO ENFORCE THE TRUST

Any "beneficiary" or the trustee may enforce the trust at any time. Only one court action can be maintained any one time, and the plan anticipates a joinder of parties. Time limits are set up also.

The relief to be granted includes the prevention of diversions, the restitution of assets, accounting, determination of rights to trust assets, requirements that security be given, and orders for distribution. Other appropriate relief may be given.

A scheme is set up for distribution pro rata of the trust assets in the event of insufficient funds. This provision compares with the federal Bankruptcy Act and apparently has the same purpose.

The existing lien statutes are not affected and payment to eliminate a lien is not an "unauthorized preference."

### PENAL PROVISIONS

Anyone who makes off with funds received from insurance proceeds would be guilty of larceny.

Anyone who misappropriates trust funds would be guilty of larceny or perjury or both.

The penal provisions are quite unrealistic, but they are of great deterrent force.

We do not recommend this complicated new procedure set forth in H. 2897 of 1964 and in S. 116 of 1963.

The subcontractor, under the present law, finds himself in a difficult position when, after the work has been completed, the owner and the general contractor or one of them refuses to make complete payment. The practical day to day operations of the subcontractor and the practical requirements of the business, make it apparent that the filing of liens prior to the commencement of the work is the exception rather than the rule. It is our understanding that some general contractors will not permit the filing of such liens. It may be true that this prohibition is not sanctioned by the law, but it is unrealistic to suppose that such is not the common practice.

At least in Massachusetts, contracting is somewhat of an art. The subcontractor engages in a business which has many perils. There are rewarding subcontracts, and there are those which result in losses.

It is a common complaint that the general contractor or the owner forces the builder and his subcontractors to make settlement of disputed claims under harsh conditions. For example, if it is agreed that the subcontractor has completed the work and is entitled to \$25,000, the owner or contractor may hold up the payment of the \$25,000 because the subcontractor also claims extras in the amount of \$1,500. Because of his financial position, the subcontractor must either take what he can get or proceed with a lawsuit. The litigation is undesirable because of the length of time it takes to obtain a hearing and adjudication of the matter. Even under the most optimum conditions in the courts, the inevitable delay of litigation discourages the most just claim.

We feel that this type of controversy is the most common. We recommend that such cases be disposed of as speedily as possible.

We think that it is unrealistic to suppose that the majority of subcontractors in Massachusetts could keep the required records of *every* contract, small or large, under this bill. We do not feel that this bill will solve the most common dilemma of the subcontractor which we have referred to.

We further believe that such a bill would unduly complicate the procedures now involved in making construction loans, especially the construction loans which are made by savings banks, life insurance companies, and other similar financial institutions.



## X. UNIFORM STATE LAWS PROPOSED

### UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT UNIFORM FOREIGN MONEY JUDGMENT ACT

#### I.

Two of the "uniform" acts supported by the Commissioners on uniform state laws were referred to the Judicial Council this year. We have discussed these uniform acts at great length and have come to the conclusion that further study should be given to both of them. The Uniform Interstate and International Procedure Act would probably have a very real and immediate impact on litigation carried on in the courts of the Commonwealth if it were to be enacted. One of the more important features of this act is the reaching out of the jurisdictional arm of the courts of Massachusetts to beckon certain litigants to come to this commonwealth to defend actions against them. Under the uniform act many more persons who transacted business in this commonwealth, or committed a tortious act, or had real estate here, and otherwise made their presence felt here, would become subject to suit in the Massachusetts courts where they are not subject to such jurisdiction now. There are other features to this uniform act which deal with the taking of depositions beyond the borders of this commonwealth and with matters such as the proof of foreign law and the proof of public records from other jurisdictions.

#### II.

The Uniform Foreign Money Judgment Act would not have any real impact on our judicial system as we now recognize valid and legitimately obtained foreign judgments. Those who propose the new uniform act support it on the principal basis that it will help Massachusetts residents who bring suit on Massachusetts judgments in foreign lands. We have no statistics from which we can discover the frequency of such cases, but we do not believe that many instances have arisen involving the enforcement of a foreign judgment here in Massachusetts. We have been told that the reciprocal feature of this uniform act is important to Massachusetts citizens because a foreign court following a rule of reciprocity is more likely to favor a Massachusetts statute than a rule found only in judicial decisions.

In both instances, we are reserving our opinion as to the necessity for this legislation in Massachusetts. We intend to study both uniform acts during the coming year and will advise the General Court of our conclusions at the end of 1965. We invite those who

are interested in these two proposals to give us the benefit of their opinions and suggestions.

The Council was also asked to consider the recent New York law mentioned in H. 2902 which became effective on September 1, 1963, and which reads as follows:—

SECTION 302. *“Personal Jurisdiction by acts of non-domiciliaries*

(a) *Acts which are the basis of jurisdiction*

A court may exercise personal jurisdiction over any non-domiciliary or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:—

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state

(b) *Effect of Appearance.* Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.”

(Citation: Section 302 (Art. 3) of New York Civil Practice Law and Rules. (CPLR) Effective on 9-1-63, possibly retroactive.)

The above is the statute to which the Council was referred, but in its consideration, reference to Section 313 was necessary, and one finds that service of process under Section 302 is to be made by . . .

“any person authorized to make service within the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister or equivalent in such jurisdiction.”

Because of the fact that § 302 of the New York Civil Practice Law is similar to some of the proposals of the Uniform Interstate and International Procedure Act, we are also reserving our opinion on the desirability of such legislation and will report on it in our 41st Annual Report.

## XI. WRONGFUL DEATH ACTIONS AND DAMAGES

### RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO ACTIONS FOR DEATH AND INJURIES RESULTING IN DEATH (H. 3456)

Resolved, That the judicial council be requested to investigate the subject matter of current house document numbered 560, amended, relative to actions for death and injuries resulting in death and the methods, manner and amount of payments in said actions, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

### DAMAGES FOR WRONGFUL DEATH

There is a renewed interest in the status of Massachusetts law with regard to the amount of money damages which may be recovered by the survivors of one who is killed due to the negligence of another. Massachusetts retains the more conservative rule that damages for wrongful death cannot exceed the statutory maximum of \$30,000. As we have pointed out in past years, there was no right to recover any damages for wrongful death at common law. The present statute (Chapter 229) is the result of a doctrine established before the Civil War. Commenting on an early statute permitting recovery of a limited amount from a common carrier, in cases of wrongful death, the court said in 1848 that "the penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the commonwealth." *Carey v. Berkshire*, 1 Cush. 475.

In 1949, our wrongful death statute allowed recovery in a minimum amount of \$2,000 and up to the maximum of \$15,000 depending on the degree of culpability of the person who caused the death. Damages for pain and suffering, and other incidental damages were and are in addition to the statutory maximum. In 1958 the maximum was raised to \$20,000, and in 1962 the statute was amended so that the minimum was \$3,000 and the maximum was \$30,000.

There is a current demand from some quarters that Massachusetts, and other jurisdictions which limit recovery by statute, repeal what is called an "anachronistic, arbitrary, and unjust limitation." The recent cases arising from the crash of an airliner on

Nantucket in 1958 seem to demonstrate the issues here. In *Kilberg v. Northeast Airlines, Inc.*, 172 N.E. 2d 526; 211 N.Y.S. 2d 133 (1961) the state court of New York awarded full compensatory damages to the survivors of the crash victim, based on the pecuniary loss to them, despite the statutory limit in effect in Massachusetts where the death occurred.

*Pearson v. Northeast Airlines*, 309 F. 2d 553 (C. C. A-2, 1962) seems to strengthen the *Kilberg* case. In the *Pearson* case the trial in the Federal court in New York resulted in a damage award of \$133,943 for the death of the New York resident who, like Kilberg, was killed in the 1958 Nantucket crash. The finding of the trial court was appealed and it was held in 307 F. 2d 131 that the full faith and credit clause compelled the New York federal trial court to limit the recovery to the \$15,000 maximum allowed by statute at the time of the crash. The case was appealed further to the full bench of the Circuit Court of Appeals for the 2nd Circuit. Speaking for the majority (6-3), Judge Kaufman said that the constitutional law did not prevent the application of the policy set forth in the New York constitution which forbade any statutory limit on recovery in such cases. Certiorari was denied in this case by the U. S. Supreme Court in 1963 (373 U. S. 912).

Thus, the New York courts not only awarded the crash victims vastly more than the Massachusetts maximum, but also adopted the legal principle that the penalty type of statute in Massachusetts (which made the award depend on the degree of culpability of the airline) was not applicable in New York, and that the true measure of damages was the actual pecuniary loss sustained by the survivors of the victims.

The storm of controversy revolves around the fact that if either the Kilberg or Pearson cases had been disposed of in the Massachusetts courts, the maximum award for wrongful death would have been \$15,000 each, exclusive of any damages for pain and suffering.

Our present wrongful death statute seems affected by inflation and rising costs. We are recommending that it again be amended so that the minimum award shall be \$5,000 and the maximum shall be \$50,000. We think it is for the General Court to decide whether or not to remove the limit entirely.

In those jurisdictions where the amount of damages is governed by the measure of actual pecuniary damages suffered, rather than by the "penal" formula which is the basis of the Massachusetts rule, some of the awards might seem very high. Recently the survivors of a gifted concert pianist were awarded damages in excess of \$900,000 for the loss to them because of his death. In other jurisdictions where the pecuniary loss formula applies, notably in



New York, Pennsylvania, and some of the southern states, awards of in excess of \$100,000 have been made to the survivors of the average bread-winner with a wife and children for the wrongful death of the head of the family.

THE "PECUNIARY LOSS" DOCTRINE

We think it appropriate to give an example of the manner in which damages are measured under the "Pecuniary Loss" method. The following example assumes the wrongful death of a bread-winner of 45 years who leaves a wife and two children ages 10 and 12. It is assumed that this individual dies after a one year illness and as a direct result of the negligence of another. It is also assumed that his salary was \$8,000 per year. The elements of damage are as follows:—

DAMAGES UNDER "PECUNIARY LOSS" DOCTRINE

1. <i>Loss of Support</i>		
a. One year during the last illness .....		\$ 8,000
1. Gross wages from employment .....	\$ 8,000	
2. Allowance for increases .....	2,000	
Total .....	\$ 10,000	
3. Less taxes and personal maintenance .....	3,500	
Net .....	6,500	
4. Life expectancy 20 yrs. ....	× 20	
	\$130,000	\$130,000
<i>Total Loss of Support</i> .....		\$138,000
2. <i>Loss of Services At Home</i>		
a. Past services performed by husband for which family paid while he was sick at \$10.00 a week .....	\$ 500	
b. Loss of future services over next 8 years on same basis .....	4,000	
Total For Loss of Services At Home .....	\$ 4,500	
3. <i>Loss of Father's Instruction And Guidance</i>		
a. 10-year-old child, 8 years @ \$1,500 .....	\$ 12,000	
b. 12-year-old child, 6 years @ \$1,500 .....	9,000	
Total .....	\$ 21,000	
4. <i>Wife's Loss of Companionship</i>		
a. Arbitrary figure .....	\$ 5,000	
5. <i>Expenses of Last Illness</i>		
a. Actual costs (insurance paid or not) .....	\$ 5,000	
6. TOTAL .....		\$173,000
7. <i>Attorney's Fees</i> (Discretionary)		

NOTE: There is considerable doubt that Items 2 and 3 (and to some extent Item 4) are recoverable under the law of Massachusetts at this date. It is probable that such items do not constitute legal damages in the typical case which arises now.

If attorneys' fees of 25% were paid *in addition* to the above award, as has been suggested by some, the total would be in excess of \$216,000. If attorneys' fees of the same amount were deducted from the net proceeds available to the survivors, the net sum to them would be about \$130,000. This percentage for attorneys' fees is, of course, less than the arrangement customarily followed in Massachusetts.

Under the provisions of Chapter 229 of the General Laws, the maximum award (exclusive of damages for pain and suffering, and damages for actual medical expenses and losses before death) would be \$30,000. We feel that a case like the one above might possibly be worth between 40% and 50% of the amount ascertained under the "Pecuniary Loss" rule if Massachusetts law was applied to this hypothetical case.

It is obvious on the basis of experience with this type of case that the jury verdicts in Massachusetts are affected by the statutory limit of \$30,000. Common sense tells us that the awards made for pain and suffering before death often appear to be larger than one would expect considering the evidence which is presented on the amount of pain and suffering which took place. Where the death is instantaneous, and there is no evidence of pain and suffering, the statutory maximum must apply under present law.

In awards for permanent disability, where the victim lives on, there is no statutory limit. The bread-winner, who is rendered a permanent invalid, may recover sums which seem adequate if properly invested, to make up for the care and otherwise compensate the family and the victim. Truly there is speculation in such awards. No one knows how long the victim will live, what pain he will endure, whether or not he would have worked for the same wages, etc. The same speculation is present under the "pecuniary loss" rule in the case of wrongful death.

We point out that the formula we have set forth is not accurate as a general rule nor applicable to all cases. If the victim was a successful surgeon, the damages would be vastly more on the basis of loss of earnings. It is also to be noted that the use of this formula excluded the idea of compensation for pain and suffering in addition to the other damages.

Having demonstrated the present situation in regard to "Wrongful Death" actions in Massachusetts, we recommend only the following new legislation at this time. We recommend none of the other bills which were referred to us by the General Court in 1964. We recommend the following:—

## DRAFT ACT

## AN ACT INCREASING THE DAMAGES RECOVERABLE FOR DEATH BY NEGLIGENCE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 2 of chapter 229 of the General Laws is hereby amended by striking out the word "thirty" and inserting in place thereof the word:—fifty, and by striking out "three" and inserting in place thereof the word "five."

SECTION 2. This act shall take effect on January first, nineteen hundred and sixty-six, and shall apply only to actions for death resulting from injuries sustained or accidents occurring on or after said date. The provisions of law applicable to actions for death, as in effect from time to time prior to the effective date of this act, shall continue to be applicable to such actions resulting from injuries which were sustained or accidents which occurred prior to the effective date of this act, in accordance with such provisions as in effect at the time the injury was sustained or the accident occurred.

## NOTE

The General Court of 1964 asked the Judicial Council to consider the merit of several bills dealing with the subject of damages for wrongful death. The bills included the following:—

House No. 752 would increase the damages recoverable for death due to negligence of a common carrier from a maximum of \$30,000 to a maximum of \$50,000 and extend the time in which an action could be brought to five years. We fail to see why there should be any difference in the limit to damages as between a common carrier and some other.

House No. 561 would completely change the law of Massachusetts relative to damages recoverable for wrongful death. This bill would substitute the "pecuniary loss" doctrine for the "penal" doctrine which is now the law of Massachusetts. Under a pecuniary loss theory, there would be no limit on the amount recoverable such as there is now. We are not recommending this change in this report.

House No. 377 would make various changes such as:—

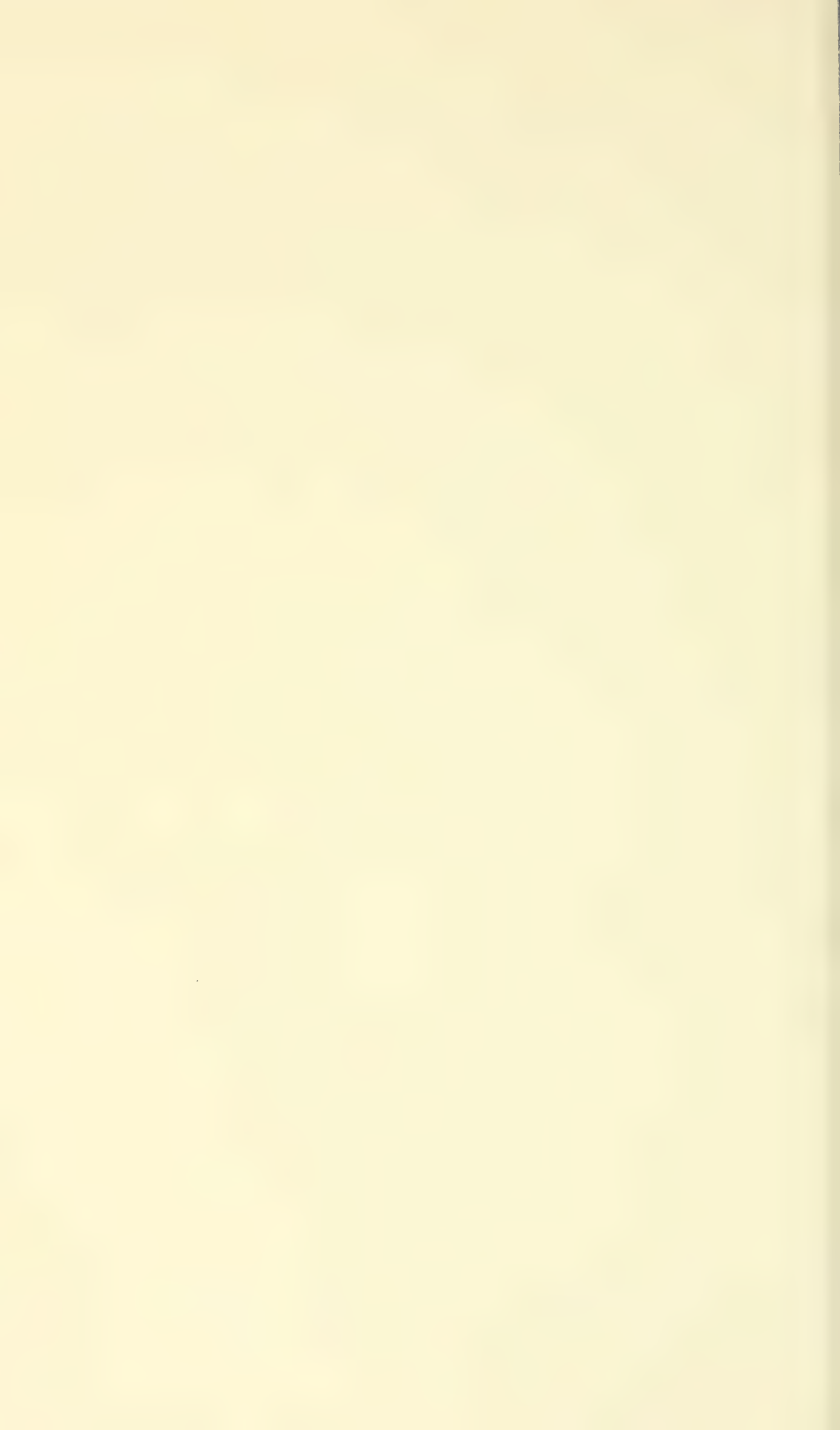
1. Remove the \$4,000 limit of damages for death resulting from a defective public way.
2. Remove the maximum limit from the present statute (Ch. 229, Sec. 2) and permit recovery based on culpability (as it now is) but without the \$30,000 limitation.
3. Apparently require a minimum \$2,000 award for conscious suffering.
4. Allow interest on judgments in wrongful death cases and permit the clerk to add interest.

We are not recommending any of the provisions of House No. 377.

















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**FORTY-FIRST REPORT**  
**Judicial Council of Massachusetts**  
**— 1965 —**

***I. Civil Practice and Procedure***

**THE "LONG ARM" OF THE MASSACHUSETTS  
COURTS**

**NEW RULE ON ORAL DISCOVERY**

***II. Criminal Law, Procedure, and Punishment***

**EXAMINATION OF RECORDS SUBPOENAED BY  
GRAND JURIES**

**EAVESDROPPING**

**APPEALS BY THE COMMONWEALTH**

***III. Evidence***

**CONVERSATIONS BETWEEN HUSBAND AND WIFE  
EMINENT DOMAIN — COMPARABLE SALES**

***IV. Fair Housing Legislation***

**"BLOCKBUSTING"**

***V. Probate Courts and Proceedings***

**PROBATION OFFICERS IN PROBATE COURTS**

*(Complete Table of Contents on Pages 1 and 2)*

## DEDICATION

We dedicate this report to the memory of Stanley E. Qua, who died November 8, 1965. Judge Qua has served with us since 1956 when he retired as Chief Justice of the Supreme Judicial Court. Judge Qua contributed stability to our judicial system from the time he became an associate justice of the Supreme Judicial Court in 1934. Law to him was a dynamic thing. He anticipated the application of established principles to social progress. In these days of turmoil, we would particularly note his words in *Kenyon v. Chicopee*, 320 Mass. 528, (1946).

"In reading the decisions holding or stating that equity will protect only property rights, one is struck by the absence of any convincing reasons for such a sweeping generalization. We are by no means satisfied that property rights and personal rights are always as distinct and readily separable as much of the public discussion in recent years would have them. But in so far as the distinction exists we cannot believe that personal rights recognized by law are in general less important to the individual or less vital to society or less worthy of protection by the peculiar remedies equity can afford than are property rights. We are impressed by the plaintiff's suggestion that if equity would safeguard their right to sell bananas it ought to be at least equally solicitous of their personal liberties guaranteed by the Constitution. We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. In general, these conditions are, that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its processes into disrepute. A number of courts have tended toward this view. Legal writers support it. There is no such body of authority opposed to it in this Commonwealth as to preclude its adoption here."



# FORTY-FIRST REPORT

## Judicial Council of Massachusetts

### 1965

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The Commonwealth of Massachusetts

JUDICIAL COUNCIL

DECEMBER, 1965

TO HIS EXCELLENCY, JOHN A. VOLPE,  
*Governor of Massachusetts*

In accordance with the provisions of  
Section 34B of chapter 221 of the General  
Laws (Ter. Ed.), we have the honor to  
transmit the forty-first annual report of the  
Judicial Council for the year 1965.

FREDERIC J. MULDOON, *Chairman*

REUBEN L. LURIE

JOHN A. COSTELLO

ELIJAH ADLOW

ARTHUR A. THOMSON

CHARLES W. BARTLETT

LIVINGSTON HALL

RAYMOND F. BARRETT

# THE ACT CREATING THE JUDICIAL COUNCIL

ACTS OF 1924, CHAPTER 244

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*As Amended by St. 1927, c. 923, St. 1930, c. 142, and St. 1947, c. 610*

*Now Appearing as G. L. (Ter. Ed.) Ch. 221, §§ 34A-34C*

## AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council," the following three new sections—*Section 34A*. There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

*Section 34B*. The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

*Section 34C*. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of five thousand dollars.

**MEMBERS OF THE JUDICIAL COUNCIL**

(DECEMBER, 1965)

FREDERIC J. MULDOON of Westwood, *Chairman*

REUBEN L. LURIE of Brookline

ARTHUR A. THOMSON of North Andover

JOHN A. COSTELLO of Andover

CHARLES W. BARTLETT of Dedham

ELIJAH ADLOW of Boston

LIVINGSTON HALL of Concord

RAYMOND F. BARRETT of Milton

JAMES B. MULDOON of Weston, *Secretary*

One Court Street, Boston, Massachusetts 02108

Telephone 742-3711

**CHANGES IN MEMBERSHIP OF THE COUNCIL IN 1965**

In October of 1965, John E. Fenton of Lawrence, Judge of the Land Court, announced his retirement from the bench. Judge Fenton thus ended his twenty-seven years of service to the Commonwealth not to retire, but to take up a new challenge as president of Suffolk University. We only regret that we are deprived of his continued service both as a judge and as a member of the Council. In a quarter century, Judge Fenton brought to this commonwealth a living spirit of justice, a rare gift of common sense, and an unfailing good humor. We envy the good fortune of Suffolk University.

In November, Stanley E. Qua, our beloved Chief Justice and our gentle man of the Judicial Council since 1956, when he retired from the Supreme Judicial Court, was taken from us. Those of us who came under his leadership and guidance share the common realization that his was a life dedicated to the end that our Commonwealth shall be "a government of laws and not of men."

Kenneth L. Nash, Chief Justice of the District Courts of the Commonwealth, found the pressure of his judicial duties too great to allow him to continue as a member of the Judicial Council; and we are pleased that Arthur A. Thomson, Justice of the Central District Court of Northern Essex, was appointed to the Council.

**INQUIRIES CONCERNING THIS REPORT**

This report is distributed by the Public Document Room at the State House in Boston. Copies are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others. As long as the supply lasts, copies of this report, and also copies of some earlier reports, can be obtained, without

charge, by requesting them from the Public Document Room, State House, Boston, Massachusetts.

Correspondence may be sent to James B. Muldoon, Secretary, Judicial Council of Massachusetts, One Court Street, Boston, Mass. 02108.

For a brief account of the history of the Judicial Council, see the 39th Annual Report for 1963 at page 11.

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**SOME 1964 RECOMMENDATIONS OF THE JUDICIAL COUNCIL  
(40th REPORT) ENACTED IN 1965**

PAGE IN 40TH REPORT	SUBJECT MATTER	ACT OF 1965	GENERAL LAWS (TER. ED.)
14-17	Removal of Actions from District Court where Claim is less than \$2,000.	Ch. 377	Ch. 231 s. 104
31-33	Criminal Penalty for Failure to Appear after Release on Bail.	Ch. 396	Ch. 276 s. 82A
50-51	Penalty for Contributing to Delinquency of a Child.	Ch. 348	Ch. 119 s. 63
59-61	Agreements NOT to revoke, make or change a will must be in writing.	Ch. 560	Ch. 259 s. 5
65-67	Exemption of Physicians from Liability when rendering emergency care.	Ch. 578	Ch. 112 s. 128
73-77	Increase in limits of liability for wrongful death.	Ch. 683	Ch. 229 s. 2

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## JUDICIAL COUNCIL

1965 HOUSE AND SENATE BILLS REFERRED  
TO THE JUDICIAL COUNCIL

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## I. CIVIL PRACTICE AND PROCEDURE

### THE "LONG ARM" OF THE MASSACHUSETTS COURTS

#### Jurisdiction over Non-Residents

#### The Uniform Interstate and International Procedure Act

##### 1. *Recent Trends in the Development of the Law*

Under the Fourteenth Amendment to the constitution of the United States, no state may deprive any person of property without due process of law. This constitutional protection was affirmed in the case of *Pennoyer v. Neff*, 95 U. S. 714 where it was decided that there were federal constitutional limits on the power of state courts to enter binding judgments against persons and corporations who were not actually served with legal process within the boundaries of the state. If a state has no jurisdiction over the foreign person or corporation, it may not enter a judgment which binds such a person or corporation.

The United States Supreme Court has in recent years liberalized the constitutional limits which are here involved:—

"But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations. . . ."

*McGee v. International Life Insurance Co.*, 355 U. S. 220 at 222; 78 S. Ct. 199 at 200.

In *International Shoe Co. v. State of Washington*, 326 U. S. 310, the U. S. Supreme Court decided that:—

" . . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice!'"

In recent decisions involving these problems of jurisdiction, the U. S. Supreme Court has noted that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part, this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and

communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (*McGee v. International Life Insurance Co.*, *supra*.)

In *Hanson v. Denckla*, 357 U. S. 235 at 250, 78 S. Ct. 1228 at 1238, the Court said:—

"In *McGee* (*supra*) the Court noted the trend of expanding personal jurisdiction over nonresidents. As technological progress has increased the flow of commerce between States, the need for jurisdiction over non-residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* . . . to the flexible standard of *International Shoe Co. v. State of Washington*."

We thus see the formal recognition by the United States Supreme Court of the current trend to impose obligations on corporations and persons who go beyond the borders of their home states especially where they seek markets and economic advantages.

We are warned in *Hanson v. Denckla*, *supra* (1958) that it would be a mistake to assume that this trend "heralds the eventual demise of *all* restrictions on the personal jurisdiction of state courts."

Restrictions on jurisdiction in this class of cases are not merely a guarantee of immunity from "inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states." Unless there really are "*minimal contacts*" by the foreign corporation or nonresident, the courts of Massachusetts and all other states would have no right to enter a judgment over the stranger beyond the borders.

## 2. *Necessity for Legislation*

The mere existence of the constitutional authority over nonresidents who have "minimal contacts" with the commonwealth of Massachusetts, as indicated by *International Shoe Co. v. Washington*, *supra*, does not automatically subject nonresident corporations and persons to the jurisdiction of the Massachusetts courts. The legislature must provide a statute and limit its scope.

In a recent study of this subject, Francis J. Larkin, Associate Dean of Boston College Law School, points out in the "1964 *Annual Survey of Massachusetts Law*," at page 268:—

"In Massachusetts, the question of the extent to which foreign corporations can inject themselves into the state without becoming subject to the in personam jurisdiction of the courts of the Commonwealth has been particularly vexatious."

Under existing law, every foreign corporation doing business in Massachusetts is required to appoint the Secretary of State as its

attorney for the service of legal process. (Gen. Laws, Chapter 181, Section 3.) And in the event that such corporation does not make the required appointment, and nevertheless does business within the commonwealth, Section 3A of Chapter 181 provides that the Secretary of State shall be deemed to have been appointed as attorney for such service of process.

Chapter 223, Section 38 provides that service of process may be made on the Secretary of State in an action against a foreign corporation, except an insurance company, which (a) has a usual place of business in the commonwealth, or (b) with, or without such usual place of business, is engaged in or soliciting business in the commonwealth, permanently or temporarily.

In actual practice, the attorney serves his writ on the Secretary of State and alleges that such officer is the attorney appointed by the nonresident corporation. This is done under the authority of Section 3A of Chapter 181. The procedures under Section 38 of Chapter 223 are less commonly used.

As indicated by Dean Larkin in his study of the subject, mere *solicitation of business* in the commonwealth is not enough to confer jurisdiction on the courts of Massachusetts. The real test is whether or not the foreign corporation is "*doing business*." Carrying this to its natural conclusion, the really significant statute is Chapter 181, Secs. 3 and 3A.

Interpretations of this statute both by our Supreme Judicial Court and by the federal District Court and U. S. Court of Appeals for the first circuit, confirm the fact that the rule of law in Massachusetts is to require far more than the "minimal contacts" which are demanded by the United States Supreme Court as a condition precedent for jurisdiction over nonresidents.

In his article, Dean Larkin notes:—

"There is no doubt that the federal court decisions construing the relevant Massachusetts statutes in this area properly reflect the approach of the Massachusetts Supreme Judicial Court. It can be asked however, whether the court, in continuing to approach the question of jurisdiction on a quantitative basis—looking for the presence of an office, etc.—is not taking an overly restrictive view. It must be remembered that, at bottom, *International Shoe* established a principle: the principle of fair play and substantial justice. In this era of expanded transportation and communication, a foreign corporation, despite the absence from the Commonwealth of the external manifestation of its business, may well so inject and impress itself upon the local economy that it would be fair and just to have it answer within the forum."

Dean Larkin assumes that it would not be an unreasonable idea, for example, to require a California manufacturer to assume certain risks and responsibilities when he ships his goods into Massachusetts and other "foreign" markets. The manufacturer, who en-



ters the national market, can prepare for contingencies and consider his subjection to this jurisdiction as part of the cost of obtaining a profit from sales in this commonwealth.

### **3. Expanding the "Long Arm" by Legislation**

In our view, it is for the General Court to decide the limits to which the jurisdiction of our Massachusetts courts should be extended. We have already indicated that such legislation cannot go beyond the limits of the *International Shoe Co. v. State of Washington* case. These limits, however, are far beyond the scope of our present law which makes "doing business" the basic test for corporations from other jurisdictions. As to individuals, there are various tests, and in the case of a motor vehicle, the mere use of our highways is sufficient to confer jurisdiction on the courts of Massachusetts. (See: *Hess v. Pawloski*, 275 U. S. 352.)

### **4. The New York "Experiment"—N. Y. Civil Practice Laws and Rules Section 302 enacted in 1962**

The General Court requested us to study this particular section of the New York Law by a resolve passed in 1964, and we have watched the development of the law of New York since that time. In brief, Section 302 of the New York practice act provided that the courts of New York could obtain jurisdiction over nonresidents including corporations if the cause of action arose out of any of the following:—

1. If a person or his agent transacts any business within the state of New York.
2. If a person or his agent commits a tortious act within the state of New York (except defamation of character).
3. If a person owns or possesses any real property situated within the state of New York.

It is to be noted that these three jurisdictional acts are not mere "minimal contacts" with New York. The cause of action must arise from (a) the business transaction, or (b) the tort, such as a motor vehicle accident, or other civil wrong, or (c) something which arises from the possession or ownership of real estate.

New York did *not* by enacting Section 302, extend its "long arm" of jurisdiction to the full extent permitted by *International Shoe v. Washington*. The New York Court of Appeals handed down the first interpretations of Section 302 during 1965. In *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 209 N. E. 2d 68, 261 N. Y. S. 2d 8 (1965) it was held that the defendant, a Delaware corporation with offices in Chicago, which contracted to perform certain manufacture and install machinery in New York, was subject to

New York jurisdiction by reason of the transaction of "*any business*" in New York even though the contract proposals were sent through the mails from Illinois to New York, the purchase order was executed in Illinois, and a supplementary agreement was signed in Illinois. The defendant's officers did travel to New York, and the contract was to be governed by New York law, and the machinery shipped into New York had a value of almost half a million dollars.

In *Feathers v. McLucas*, the second part of Section 302 was involved. The defendant was the manufacturer of a tank which was mounted on a truck bed and filled with liquid propane. Defendant manufacturer was a Kansas corporation which sold the allegedly defective tank to a Missouri corporation which defendant knew would mount it on the truck and sell it to a Pennsylvania corporation. While enroute from Pennsylvania to Vermont the tank exploded.

The New York court of appeals interpreted Section 302 strictly and said that the defendant manufacturer from Kansas did not commit a tort *within* New York. If he was negligent, his negligence took place in Kansas. The court said that the New York legislature did not go as far as the Illinois lawmakers had done in a similar statute.

It is notable here that Judge Van Voorhis concurred with the majority and said that the new Section 302 did not extend the "long arm" of New York's jurisdiction to the extent permitted under the due process clause and under the recent United States Supreme Court decisions.

In *Rosenblatt v. American Cyanamid Co.*, 86 Sup. Ct. 1 (November 1965), it was decided that under Section 302 of the New York law, a defendant living in Rome, Italy, could be served in Rome, Italy, (presumably by Italian sheriffs or their equivalent) to answer a tort suit pending in the New York Court. Rosenblatt allegedly participated in a conspiracy to obtain stolen trade secrets which had been unlawfully secured by one Fox in New York.

Fox went to Italy and conspired to sell the secrets to Rosenblatt and his company which was to use these secrets to compete with American Cyanamid Co. Rosenblatt flew to New York and inspected the secrets there. Rosenblatt paid some of the money in New York and took the secrets back to Italy.

Said Goldberg, J., "This is more than sufficient to meet the constitutional test as enunciated in our decisions."

*Hanson v. Denckla*, 357 U. S. 235 was cited in support of the decision by Goldberg, J. that Rosenblatt, in Italy, was not denied

“fair play and substantial justice” by making him come back and defend himself before the New York courts.

The basis for New York jurisdiction was the one single “tortious act” by Rosenblatt in New York.

The third part of Section 302 was not interpreted at the time of our analysis, although in *Singer v. Walker*, it was held that where the manufacturer of a geologist’s hammer shipped a substantial quantity of his product into New York on the solicitation of a New York manufacturer’s representative, there was sufficient contact with New York to permit the plaintiff to sue the manufacturer in New York when a chip broke from one of the hammers and penetrated the eye of the New York purchaser.

In an excellent student note in the “Boston College Industrial and Commercial Law Review,” Vol. VII No. 1, Fall, 1965 at p. 135, Mr. Michael L. Goldberg has explained the impact of Section 302 on the law of New York. We think Goldberg has correctly concluded that New York, after the interpretations by the Court of Appeals this year, “does not get as much mileage out of its statute as it could.” Whether this is the result of the limits of the statute itself or because of the restrictive application in the three recent cases, we cannot be sure.

In any event, both in its legislative approach and in its judicial interpretation, New York has thus far occupied a middle ground. Massachusetts now clings to a conservative position. Illinois and Minnesota may be said to take a broad legislative view, and the United States Supreme Court requires only minimum contacts and standards of fair play.

## **5. Recommendations of the Judicial Council**

### ***The Uniform Interstate and International Procedure Act***

We have traced the recent constitutional trends in the extension of the jurisdictional “long arm” of a sovereign state. It is our conclusion that the law of our commonwealth should be expanded to allow our citizens to hold nonresidents answerable before the courts of this commonwealth. Our direct answer to the General Court is that while Section 302 of the New York law does in fact extend the jurisdictional “long arm,” the Uniform Act we support is a more comprehensive vehicle by which this purpose can be accomplished. There is no question but that the Uniform Act extends the jurisdictional “long arm” of the state to a point at the outer limits defined by the United States Supreme Court in *International Shoe Co. v. State of Washington*. We do not think that these limits of minimal contacts and fair play are exceeded, and we feel that our

Supreme Judicial Court will quickly set such constitutional boundary posts as may be required.

Upon the passage of this legislation, foreign corporations and individuals who derive economic and other benefits from our commonwealth will henceforth be subject to the jurisdiction of its courts. Our citizens will not be required to litigate their claims in foreign fields at considerable expense to themselves. In one sense at least, Massachusetts is a major marketing area of five million people and a major industrial society. We believe that only the most insubstantial foreign corporation will be deterred from participating in our economic life because of this new law. In the major commercial centers of New York and Chicago, our corporations are already subject to jurisdictional obligations of this type. We, therefore, recommend the following:



## 1966 DRAFT ACT

## HOUSE . . . . 1964 . . . . No. 108

AMENDED  
APPENDIX B

---

AN ACT ESTABLISHING THE UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. The General Laws as hereby amended by in-  
2 serting after chapter 223 thereof the following new chapter:—

3 CHAPTER 223A.

4 UNIFORM INTERSTATE AND INTERNATIONAL  
5 PROCEDURE ACT.

6 ARTICLE I. BASES OF PERSONAL JURISDICTION OVER PERSONS  
7 OUTSIDE THIS STATE.

8 *Section 1.* As used in this Article, “person” includes an  
9 individual, his executor, administrator or other personal repre-  
10 sentative, or a corporation, partnership, association or any  
11 other legal or commercial entity, whether or not a citizen or  
12 domiciliary of this state and whether or not organized under  
13 the laws of this state.

14 *Section 2.* A court may exercise personal jurisdiction over  
15 a person domiciled in, organized under the laws of, or main-  
16 taining his or its principal place of business in, this state as to  
17 any cause of action.

18 *Section 3. (a)* A court may exercise personal jurisdiction  
19 over a person, who acts directly or by an agent, as to a cause  
20 of action arising from the person’s

21 (1) transacting any business in this state;

22 (2) contracting to supply services or things in this state;

23 (3) causing tortious injury by an act or omission in this  
24 state;

25 (4) causing tortious injury in this state by an act or omis-  
26 sion outside this state if he regularly does or solicits business,  
27 or engages in any other persistent course of conduct, or derives  
28 substantial revenue from goods used or consumed or services  
29 rendered, in this state;

30 (5) having an interest in, using or possessing real property  
31 in this state; or

32 (6) contracting to insure any person, property or risk lo-  
33 cated within this state at the time of contracting.

34 (b) When jurisdiction over a person is based solely upon  
35 this section, only a cause of action arising from acts enumerated  
36 in this section may be asserted against him.

37 *Section 4.* When the exercise of personal jurisdiction is au-  
38 thorized by this Article, service may be made outside this  
39 state.

40 *Section 5.* When the court finds that in the interest of sub-  
41 stantial justice the action should be heard in another forum,  
42 the court may stay or dismiss the action in whole or in part on  
43 any conditions that may be just.

44

#### ARTICLE II. SERVICE.

45 *Section 6. (a)* When the law of this state authorizes service  
46 outside this state, the service, when reasonably calculated to  
47 give actual notice, may be made:

48 (1) by personal delivery in the manner prescribed for service  
49 within this state;

50 (2) in the manner prescribed by the law of the place in which  
51 the service is made for service in that place in an action in any  
52 of its courts of general jurisdiction;

53 (3) by any form of mail addressed to the person to be  
54 served and requiring a signed receipt;

55 (4) as directed by the foreign authority in response to a  
56 letter rogatory; or

57 (5) as directed by the court.

58 (b) Proof of service outside this state may be made by  
59 affidavit of the individual who made the service or in the man-  
60 ner prescribed by the law of this state, the order pursuant to  
61 which the service is made, or the law of the place in which the  
62 service is made for proof of service in an action in any of its  
63 courts of general jurisdiction. When service is made by mail,  
64 proof of service shall include a receipt signed by the addressee  
65 or other evidence of personal delivery to the addressee satis-  
66 factory to the court.

67 *Section 7.* Service outside this state may be made by an  
68 individual permitted to make service of process under the law  
69 of this state or under the law of the place in which the service  
70 is made or who is designated by a court of this state.

71 *Section 8.* When the law of this state requires that in order  
72 to effect service one or more designated individuals be served,  
73 service outside this state under this Article must be made upon

74 the designated individual or individuals.

75 *Section 9. (a)* A court of this state may order service upon  
76 any person who is domiciled or can be found within this state of  
77 any document issued in connection with a proceeding in a  
78 tribunal outside this state. The order may be made upon ap-  
79 plication of any interested person or in response to a letter  
80 rogatory issued by a tribunal outside this state and shall direct  
81 the manner of service.

82 *(b)* Service in connection with a proceeding in a tribunal  
83 outside this state may be made within this state without an  
84 order of court.

85 *(c)* Service under this section does not, of itself, require the  
86 recognition or enforcement of an order, judgment or decree  
87 rendered outside this state.

88 ARTICLE III. TAKING DEPOSITIONS.

89 *Section 10. (a)* A deposition to obtain testimony or docu-  
90 ments or other things in an action pending in this state may be  
91 taken outside this state:

92 (1) On reasonable notice in writing to all parties, setting  
93 forth the time and place for taking the deposition, the name  
94 and address of each person to be examined, if known, and if  
95 not known, a general description sufficient to identify him or  
96 the particular class or group to which he belongs and the name  
97 or descriptive title of the person before whom the deposition  
98 will be taken. The deposition may be taken before a person  
99 authorized to administer oaths in the place in which the  
100 deposition is taken by the law thereof or by the law of this  
101 state or the United States.

102 (2) Before a person commissioned by the court. The person  
103 so commissioned has the power by virtue of his commission to  
104 administer any necessary oath.

105 (3) Pursuant to a letter rogatory issued by the court. A  
106 letter rogatory may be addressed "To the Appropriate Au-  
107 thority in [here name the state or country]."

108 (4) In any manner before any person, at any time or place,  
109 or upon any notice stipulated by the parties. A person desig-  
110 nated by the stipulation has the power by virtue of his desig-  
111 nation to administer any necessary oath.

112 *(b)* A commission or a letter rogatory shall be issued after  
113 notice and application to the court, and on terms that are just  
114 and appropriate. It is not requisite to the issuance of a com-  
115 mission or a letter rogatory that the taking of the deposition  
116 in any other manner is impracticable or inconvenient, and both  
117 a commission and a letter rogatory may be issued in proper  
118 cases. Evidence obtained in a foreign country in response to  
119 a letter rogatory need not be excluded merely for the reason

120 that it is not a verbatim transcript or that the testimony was  
121 not taken under oath or for any similar departure from the re-  
122 quirements for depositions taken within this state.

~~123 (c) When no action is pending, a court of this state may au-~~  
~~124 thorize a deposition to be taken outside this state of any per-~~  
~~125 son regarding any matter that may be cognizable in any court~~  
~~126 of this state. The court may prescribe the manner in which~~  
~~127 and the terms upon which the deposition shall be taken.~~

128 *Section 11. (a)* A court of this state may order a person  
129 who is domiciled or is found within this state to give his testi-  
130 mony or statement or to produce documents or other things  
131 for use in a proceeding in a tribunal outside this state. The  
132 order may be made upon the application of any interested per-  
133 son or in response to a letter rogatory and may prescribe the  
134 practice and procedure, which may be wholly or in part the  
135 practice and procedure of the tribunal outside this state, for  
136 taking the testimony or statement or producing the documents  
137 or other things. To the extent that the order does not pre-  
138 scribe otherwise, the practice and procedure shall be in accord-  
139 ance with that of the court of this state issuing the order. The  
140 order may direct that the testimony or statement be given, or  
141 document or other thing produced, before a person appointed  
142 by the court. The person appointed shall have power to ad-  
143 minister any necessary oath.

144 (b) A person within this state may voluntarily give his testi-  
145 mony or statement or produce documents or other things for  
146 use in a proceeding before a tribunal outside this state.

#### 147 ARTICLE IV. DETERMINATION OF FOREIGN LAW.

148 *Section 12.* A party who intends to raise an issue concern-  
149 ing the law of any jurisdiction or governmental unit thereof  
150 outside this state shall give notice in his pleadings or other  
151 reasonable written notice.

152 *Section 13.* In determining the law of any jurisdiction or  
153 governmental unit thereof outside this state, the court may  
154 consider any relevant material or source, including testimony,  
155 whether or not submitted by a party or admissible under the  
156 rules of evidence.

157 *Section 14.* The court, not jury, shall determine the law of  
158 any governmental unit outside this state. Its determination is  
159 subject to review on appeal as a ruling on a question of law.

#### 160 ARTICLE V. PROOF OF OFFICIAL RECORDS.

161 *Section 15.* An official record kept within the United States,  
162 or any state, district, commonwealth, territory, insular pos-  
163 session thereof, or the Panama Canal Zone, the Trust Territory



164 of the Pacific Islands, or the Ryukyu Islands, or an entry  
165 therein, when admissible for any purpose, may be evidenced  
166 by an official publication thereof or by a copy attested by the  
167 officer having the legal custody of the record, or by his deputy,  
168 and accompanied by a certificate that the officer has the cus-  
169 tody. The certificate may be made by a judge of a court of  
170 record having jurisdiction in the governmental unit in which  
171 the record is kept, authenticated by the seal of the court, or  
172 by any public officer having a seal of office and having official  
173 duties in the governmental unit in which the record is kept,  
174 authenticated by the seal of his office.

175 *Section 16.* A foreign official record, or an entry therein,  
176 when admissible for any purpose, may be evidenced by an  
177 official publication or copy thereof, attested by a person au-  
178 thorized to make the attestation, and accompanied by a final  
179 certification as to the genuineness of the signature and official  
180 position (1) of the attesting person, or (2) of any foreign official  
181 whose certificate of genuineness of signature and official posi-  
182 tion either (a) relates to the attestation or (b) is in a chain of  
183 certificates of genuineness of signature and official position re-  
184 lating to the attestation. A final certification may be made  
185 by a secretary of embassy or legation, consul general, consul,  
186 vice consul, or consular agent of the United States, or a dip-  
187 lomatic or consular official of the foreign country assigned or  
188 accredited to the United States. If reasonable opportunity  
189 has been given to all parties to investigate the authenticity  
190 and accuracy of the documents, the court may, for good cause  
191 shown, (1) admit an attested copy without final certification  
192 or (2) permit the foreign official record to be evidenced by an  
193 attested summary with or without a final certification.

194 *Section 17.* The statutes, codes, written laws, executive acts  
195 or legislative or judicial proceedings of any domestic or foreign  
196 jurisdiction or governmental unit thereof may also be evi-  
197 denced by any publication proved to be commonly accepted as  
198 proof thereof in the tribunals having jurisdiction in the gov-  
199 ernmental unit.

200 *Section 18.* A written statement that after diligent search  
201 no record or entry of a specified tenor is found to exist in the  
202 records designated by the statement, authenticated as pro-  
203 vided in this Article in the case of a domestic record, or com-  
204 plying with the requirements of this Article for a summary in  
205 the case of a record in a foreign country, is admissible as evi-  
206 dence that the records contain no such record or entry.

207

## ARTICLE VI. MISCELLANEOUS.

208 *Section 19.* Except as otherwise provided herein, this chap-  
209 ter does not repeal or modify any law of this state

210 (a) authorizing the exercise of jurisdiction on any basis other  
211 than the bases specified in Article I of this chapter;

212 (b) permitting a procedure for service or for obtaining testi-  
213 mony, documents or other things for use in this state or in a  
214 tribunal outside this state other than the procedures prescribed  
215 in Article II and Article III of this chapter; or

216 (c) authorizing the proof of official records or any entry or  
217 lack of entry therein by any method other than the methods  
218 prescribed in Article V of this chapter.

219 *Section 20.* This chapter shall be so interpreted and con-  
220 strued as to effectuate its general purposes to make uniform  
221 the laws of those states which enact it.

1 SECTION 2. If any provision of this act or the application  
2 thereof to any person or circumstances is held invalid, the in-  
3 validity does not affect other provisions or applications of the  
4 act which can be given effect without the invalid provision or  
5 application, and to this end the provisions of this act are  
6 severable.

1 SECTION 3. Section seventy of chapter two hundred and  
2 thirty-three of the General Laws is hereby repealed.

NOTE: The Judicial Council does not recommend the inclusion of  
lines 123 to 127 inclusive. This Uniform Act was filed as  
House No. 108, Appendix B in 1964. We were asked to  
study this further by Chapter 37 of the Resolves of 1965.

### DISSENTING OPINION OF JUDGE ADLOW

Judge Adlow dissents from the opinion of the majority and  
would not recommend the adoption of the Uniform Interstate and  
International Procedure Act in Massachusetts.

## ORAL DISCOVERY

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A petition for a new court rule allowing pre-trial oral discovery was filed with the Supreme Judicial Court by the Massachusetts Bar Association and the Boston Bar Association in the summer of 1965. The interested parties filed briefs with the court on September 15, 1965.

The judiciary obviously has no vested interest in delaying the progress of litigation or in postponing the disposition of contested claims. Those who actively oppose pre-trial oral discovery seem to base their opposition almost entirely on foundations of self-interest. At no time during the immediate past has anyone made any sound argument that oral discovery before trial is not a worthwhile procedural aid in the better administration of justice for the citizens of Massachusetts.

The Judicial Council speaks for no faction, industry, or private interest, large or small. Our only purpose is to improve the methods of practice and procedure in the judicial system of the commonwealth.

To those groups which fear that oral discovery will require them to alter their methods and customs, we can only say that such methods and customs are no longer adequate.

Oral discovery before trial has been recommended in Massachusetts for no less than forty-four years. In 1921, the Judicature Commission in its second and Final Report at pps. 106-110 (House Doc. No. 1205 of 1921), advocated this procedural advance. Since that time, the Judicial Council has urged pre-trial oral discovery in one form or another. Some proposals have been less desirable than others.

The Judicial Council recommends that the type of oral discovery contemplated by the proposed rule offered to the Supreme Judicial Court by the Massachusetts Bar Association and the Boston Bar Association be adopted without substantial change.

Recently the 27th American Assembly at Columbia University published a summary of its discussions on "*The Courts, The Public and the Law Explosion.*" One of the observations is particularly noteworthy here:

"Surprise was a legitimate trial tactic. A lawsuit was viewed as a game or a joust in which counsel for each side strove mightily for his client, and the theory was that justice would emerge triumphant when the dust of combat settled in the judicial arena. The flaw in this practice was that the decision would frequently be a prize awarded for the prowess of counsel, instead of an

adjudication of the case upon its merits. Dean Pound has called the process the 'sporting theory of justice.'"

The common law remained indifferent for centuries to the injustices implicit in this system. It did provide feeble remedies to enable a lawyer to obtain evidence to support his client's case, but, if he sought to find out details of his opponent's case, he was denied relief on the ground that the court would not be a party to a "fishing expedition."

It was not until the first quarter of the present century that a new philosophy emerged, one which has drastically changed the trial of a lawsuit. In summary form it may be stated thus: The goal of a trial should be a just decision on the merits; this requires that all relevant facts be presented to the court; this demands complete pre-trial disclosures; and this means the elimination of surprise as a legitimate trial tactic. The implementation of this new philosophy occurred with the promulgation of new rules of civil procedure for the federal courts in 1938. The new rules furnish counsel with a complete set of tools for the discovery of the truth prior to trial. Under these rules the old cry of "fishing expedition" is no longer available. Each party to a suit is required, upon proper request, to furnish the other party with full factual details.

The Supreme Judicial Court promulgated Rule 15 on December 29, 1965 providing for Depositions and Discovery. For the rule see APPENDIX A on page 71 at the end of this report. The rule is effective April 1, 1966.

### **UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT**

Under the United States constitution Article IV, Section 1, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

There is no real problem which requires legislative action in regard to money judgments given by the courts of our sister states.

The Uniform Act we recommend applies to judgments rendered by a court of competent jurisdiction anywhere in the world.

Under the decisions of our Supreme Judicial Court, we believe that a money judgment of a court of a "foreign state" would be recognized if our own courts found that such judgment was rendered by a court which observed our own concepts of due process of law and jurisdiction over the person and over the subject matter.

Under the proposed Uniform Act, it would be possible to enforce a judgment rendered by a court in Moscow, the Easter Islands, Madagascar or Nepal. But the courts of this commonwealth could (and we would expect they would) examine the situation to see that such judgment is entitled to full faith and credit. The tests to be used are set forth in Section 4 of the Uniform Act.

Because we believe that our courts now proceed on the principles



set forth in this Uniform Act, we do not believe that there will be any significant change in our law.

We recommend the Uniform Act chiefly on the basis that a statute of this nature will prove useful to our own citizens who seek to enforce Massachusetts judgments in foreign courts. If the court in Madrid can be assured (by directing its attention to a statute like this) that Massachusetts will recognize a Spanish judgment, we feel the Spanish court or any other foreign court, will be more ready to enforce the judgment rendered here.

We, therefore, recommend the following:

1966 DRAFT ACT

HOUSE . . . . 1964 . . . . No. 108

APPENDIX C

AN ACT ESTABLISHING THE UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 The General Laws are hereby amended by inserting after  
2 chapter 235 the following new chapter:—

3 CHAPTER 235A.

4 UNIFORM FOREIGN MONEY-JUDGMENTS RECOG-  
5 NITION ACT.

6 *Section 1.* As used in this chapter:

7 (1) “foreign state” means any governmental unit other than  
8 the United States, or any state, district, commonwealth, terri-  
9 tory, insular possession thereof, or the Panama Canal Zone, the  
10 Trust Territory of the Pacific Islands, or the Ryukyu Islands;

11 (2) “foreign judgment” means any judgment of a foreign  
12 state granting or denying recovery of a sum of money, other than  
13 a judgment for taxes, a fine or other penalty, or a judgment for  
14 support in matrimonial or family matters.

15 *Section 2.* This chapter applies to any foreign judgment that  
16 is final and conclusive and enforceable where rendered even  
17 though an appeal therefrom is pending or it is subject to appeal.

18 *Section 3.* Except as provided in section 4, a foreign judg-  
19 ment meeting the requirements of section 2 is conclusive be-  
20 tween the parties to the extent that it grants or denies recovery  
21 of a sum of money. The foreign judgment is enforceable in the  
22 same manner as the judgment of a sister state which is entitled  
23 to full faith and credit.

24    *Section 4. (a)* A foreign judgment is not conclusive if—

25    (1) the judgment was rendered under a system which does  
26 not provide impartial tribunals or procedures compatible with  
27 the requirements of due process of law;

28    (2) the foreign court did not have personal jurisdiction over  
29 the defendant; or

30    (3) the foreign court did not have jurisdiction over the sub-  
31 ject matter.

32    (b) A foreign judgment need not be recognized if

33    (1) the defendant in the proceedings in the foreign court did  
34 not receive notice of the proceedings in sufficient time to enable  
35 him to defend;

36    (2) the judgment was obtained by fraud;

37    (3) the cause of action on which the judgment is based is  
38 repugnant to the public policy of this state;

39    (4) the judgment conflicts with another final and conclusive  
40 judgment;

41    (5) the proceeding in the foreign court was contrary to an  
42 agreement between the parties under which the dispute in ques-  
43 tion was to be settled otherwise than by proceedings in that  
44 court; or

45    (6) in the case of jurisdiction based only on personal service,  
46 the foreign court was a seriously inconvenient forum for the  
47 trial of the action.

48    *Section 5. (a)* The foreign judgment shall not be refused  
49 recognition for lack of personal jurisdiction if

50    (1) the defendant was served personally in the foreign state;

51    (2) the defendant voluntarily appeared in the proceedings,  
52 other than for the purpose of protecting property seized or  
53 threatened with seizure in the proceedings or of contesting the  
54 jurisdiction of the court over him;

55    (3) the defendant prior to the commencement of the proceed-  
56 ings had agreed to submit to the jurisdiction of the foreign court  
57 with respect to the subject matter involved;

58    (4) the defendant was domiciled in the foreign state when the  
59 proceedings were instituted, or, being a body corporate had its  
60 principal place of business, was incorporated, or had otherwise  
61 acquired corporate status, in the foreign state;

62    (5) the defendant had a business office in the foreign state  
63 and the proceedings in the foreign court involved a cause of ac-  
64 tion arising out of business done by the defendant through that  
65 office in the foreign state; or

66    (6) the defendant operated a motor vehicle or airplane in the  
67 foreign state and the proceedings involved a cause of action  
68 arising out of such operation.

69    (b) The courts of this state may recognize other bases of  
70 jurisdiction.

71 *Section 6.* If the defendant satisfies the court either that an  
72 appeal is pending or that he is entitled and intends to appeal  
73 from the foreign judgment, the court may stay the proceedings  
74 until the appeal has been determined or until the expiration of a  
75 period of time sufficient to enable the defendant to prosecute the  
76 appeal.

77 *Section 7.* This chapter does not prevent the recognition of a  
78 foreign judgment in situations not covered by this chapter.

79 *Section 8.* This chapter shall be so construed as to effectuate  
80 its general purpose to make uniform the law of those states  
81 which enact it.

### IMPLEADER, DISTRICT COURTS

In 1964, Section 4B was added to Chapter 231 of the General Laws. The section reads as follows:

"§ 4B. *Impleader.* Before the filing of his answer, or within thirty days thereafter, a defendant, on notice to plaintiff, may, as third-party plaintiff, enter a writ and have served a summons and third-party declaration upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. Subsequent to thirty days after filing his answer, the defendant may move on notice to the plaintiff for leave so to enter a writ and have served a summons and declaration upon such person, hereinafter entitled the third-party defendant. Such third-party defendant shall make his defenses to the third-party plaintiff's claim, and may also assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The plaintiff may by amendment assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant, and subsequent parties defendant may likewise proceed under this section against persons not parties to the action who may in turn be liable to such subsequent parties defendant for all or part of the claims made against such subsequent parties defendant."

In our 39th Report for 1963 at page 60, we favored this new statute and pointed out that it had the object of bringing into the original action all related claims and thereby eliminating "a chain of subsequent actions."

It was our intention that this statute would be applicable to proceedings in the District Courts.

By some omission, Section 141 of Chapter 231 of the General Laws was not amended when this new statute (§ 4B) was enacted. This amendment is necessary to allow Impleader in the district courts.

We, therefore, recommend the following:

**1966 DRAFT ACT**

SECTION 1. Section 141 of Chapter 231 of the General Laws, as most recently amended, is hereby further amended by adding in line two after the words "four A" the words "four B."

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**STATUTE OF LIMITATIONS,  
ARCHITECTS & ENGINEERS**

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**HOUSE . . . . 1965 . . . . No. 2135**

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AN ACT PROVIDING A LIMITATION OF TWO YEARS FOR THE BRINGING OF ACTIONS OF CONTRACT OR TORT FOR MALPRACTICE, ERROR, OR MISTAKE AGAINST ARCHITECTS AND PROFESSIONAL ENGINEERS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 The first paragraph of section 4 of chapter 260 of the General  
2 Laws, as amended, is hereby further amended by adding after  
3 the words "of chapter one hundred twelve," the words:—ar-  
4 chitects registered under sections sixty A to sixty M, inclusive  
5 of said chapter one hundred twelve and professional engineers  
6 registered under sections eighty-one D to eighty-one T inclusive  
7 of said chapter one hundred twelve,—so as to read as follows:—

8 *Section 4. Limitation of Two Years; Limitation of One Year for*  
9 *Certain Actions.* Actions for assault and battery, false imprison-  
10 ment, slander, actions against sheriffs, deputy sheriffs, constables  
11 or assignees in insolvency for the taking or conversion of personal  
12 property, actions of contract or tort for malpractice, error or  
13 mistake against physicians, surgeons, dentists, optometrists,  
14 hospitals and sanatoria, hairdressers, operators and shops regis-  
15 tered under sections eighty-seven T to eighty-seven JJ, inclusive,  
16 of chapter one hundred twelve, architects registered under sec-  
17 tions sixty A to sixty M inclusive of said chapter one hundred  
18 twelve and professional engineers registered under sections  
19 eighty-one D to eighty-one T inclusive of said chapter one hun-  
20 dred twelve, actions of tort for bodily injuries or for death the  
21 payment of judgments in which is required to be secured by  
22 chapter ninety and also actions of tort for bodily injuries or for  
23 death or for damage to property against officers and employees  
24 of the commonwealth, of the metropolitan district commission,  
25 and of any county, city or town, arising out of operation of motor  
26 or other vehicles owned by the commonwealth, including those  
27 under the control of said commission, or by any such county,  
28 city or town, suits by judgment creditors in such actions of tort  
29 under section one hundred and thirteen of chapter one hundred



30 and seventy-five and clause (10) of section three of chapter two  
31 hundred and fourteen and suits on motor vehicle liability bonds  
32 under sections thirty-four G of said chapter ninety shall be com-  
33 menced only within two years after the cause of action accrues;  
34 and actions for libel shall be commenced only within one year  
35 next after the cause of action accrues.

At present, registered professional architects and registered professional engineers are liable to actions of contract or tort for malpractice, error, or mistake if such actions are brought within six years (Chapter 260, § 2) after the cause of action accrues.

The proposed amendment would reduce the time to bring action to two (2) years and thus place engineers on a footing with those who practice the healing arts, hospitals, hairdressers, beauty operators and others who render a direct personal service.

By Chapter 302 of the Acts of 1965 the time for bringing actions against physicians, surgeons, dentists, optometrists, hospitals and sonitoria, was extended from two years to three years.

We can see no reason to class architects and engineers with doctors and beauticians. The mistakes of engineers and architects sometimes do not become fully and immediately apparent as do those of the surgeon or the hairdresser.

We do not recommend this bill.

**II. CRIMINAL LAW, PROCEDURE AND PUNISHMENT**

**EXAMINATION OF RECORDS SUBPOENAED BY  
THE GRAND JURY**

**SENATE . . . . 1965 . . . . No. 287**

AN ACT TO PROVIDE FOR THE EXAMINATION BY EXPERTS OF RECORDS SUBPOENAED  
BY A GRAND JURY.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter two hundred and seventy-seven of the General
- 2 Laws is hereby amended by adding thereto a new section
- 3 number fourteen A as follows: "*Section fourteen A*" Whenever
- 4 any documents, records, and other physical evidence are
- 5 furnished to a Grand Jury pursuant to a subpoena issued on
- 6 behalf of the Grand Jury, the Grand Jury may retain such
- 7 documents, records, and other physical evidence for the pur-
- 8 pose of having such documents, records, and other physical
- 9 evidence examined at a convenient place to be designated by

10 the Grand Jury, by accountants, laboratory technicians, or  
11 other experts, or by the District Attorney, or Attorney Gen-  
12 eral, or his Assistants for the purpose of analyzing such docu-  
13 ments, records, and other physical evidence and reporting  
14 thereon to the Grand Jury. Any expert designated by the  
15 Grand Jury to inspect such documents, records, and other  
16 physical evidence as aforesaid other than a District Attorney,  
17 the Attorney General, or their Assistants shall first be brought  
18 before the Grand Jury and sworn to the faithful performance  
19 of his duty, and further sworn to maintain said documents,  
20 records, and other physical evidence in the same condition as  
21 they were when submitted to him, and further sworn to main-  
22 tain secrecy concerning his activities on behalf of the Grand  
23 Jury until such time as he may be called to testify concerning  
24 them before a Court of the Commonwealth.

25 Upon the termination of the Grand Jury's investigation con-  
26 cerning said documents, records, and other physical evidence  
27 they shall be returned to the person who furnished them to  
28 the Grand Jury, unless the Grand Jury shall have returned an  
29 indictment based upon said documents, records, and other  
30 physical evidence. In such case, upon motion of the District  
31 Attorney or Attorney General, the Court may order said  
32 documents, records, and other physical evidence impounded  
33 pending the trial of said indictment. The Court may permit  
34 such inspection of said impounded documents, records, and  
35 other physical evidence pending the trial of said indictment by  
36 the defendant, or his attorney, or by the District Attorney, or  
37 the Attorney General, or their Assistants as justice may re-  
38 quire; and a defendant shall have the right to inspect his own  
39 records which have been so impounded, upon motion, subject  
40 to such safeguards as the court may deem necessary to safe-  
41 guard said records.

It is the function of the 23 members of the grand jury to present an accusation for trial before a jury in our Superior Court.

In a number of cases, embezzlement, swindling, etc., being good examples, it is sometimes necessary to lay certain records and documents before the grand jury in order to provide some of the basis for a true bill of indictment of the accused. We feel however that there are few real problems in this type of case.

Under present law, much of it coming down to us from that body of common law we inherited from England, and developed through 340 years of the life of our society, records and documents, papers and writings are laid bare to the grand jurors by summoning in the owner or custodian thereof. It is thus even now possible to obtain the records; it is not quite so easy to interpret them.

At one time our General Court provided that any person "that

Judgeth himself oppressed by Shop Keepers or Merchants in setting Excessive Prices on their goods have hereby liberty to make their Complaint to the Grand Jurors. . . .” Presumably these colonial Grand Jurors would have, at worst, to struggle with but one book of account in order to check the figures and costs and indict the offender for setting excessive prices.

In our present society, the law is not now the same; but even if it were still possible to bring such an unsophisticated matter before our Grand Jurors, as it was in 1675, (see Col. Laws Ch. 236, Sec. 11) we would have, instead of one book, the possible necessity to summons in before the Grand Jury the electronically operated computer maintained cost accounting records of a chain of department stores from one end of the State to the other. This we could not do without a supreme effort by all concerned; and an “expert” might be needed.

Our social progress makes documents proliferate to such an extent that in all but the most extreme cases, it is quite impossible to present a mass of documents to a grand jury and expect the jurors to swallow it in one gulp like the whale swallowed Jonah.

Senate 287 is a proposition which is apparently offered by the Attorney General for the purposes of pre-digesting masses of information and evidence and serving up to the grand jurors the rare viands and juices which will help to persuade that body to present an accusation for trial before the judge and jury in the Superior Court. In this context it seems appropriate to once again consider the end result—the Indictment. Never was there a better statement on this subject than that which appeared in the *Boston Herald* on November 16, 1921 when a justice of the Supreme Judicial Court was indicted for conspiracy and the Attorney General of the Commonwealth was indicted for larceny. Both were subsequently exonerated.

### **“What is an Indictment?”**

“It is important that the community should understand how much and what an indictment means. The District Attorney in any community establishes a relation with the Grand Jury as its official adviser which gives him very great influence over its deliberation.

“The Grand Jury itself is a body of twenty-three men before whom anybody is entitled to bring a complaint against anyone whom he charges with crime. The Grand Jury hears the evidence of the complainant usually without giving the defendant any opportunity to explain or justify his course—and then if twelve of the grand jurymen think, on that evidence alone, that the defendant should be tried they vote for the indictment and the indictment is returned. Eleven others may differ with them, but if twelve vote for the indictment, it is enough.

"Now in determining whether to vote for an indictment or not, the jury naturally and inevitably listens to the advice of the District Attorney, and if he advises them that in his judgment the indictment should be returned, they follow his advice in most cases, and consequently the indictment becomes an expression of his purpose. This gives the District Attorney great irresponsible power. Whenever an indictment is found it is accordingly important for the public to remember how much is due to the evidence and how much to the personal advice of the District Attorney."

How then does Senate No. 287 assist the District Attorney or the Attorney General to move the Grand Jury to indict?

### **The Proposed In-Depth Investigation Under Grand Jury Auspices**

As we read this bill, the new proposed procedure is to be as follows:

1. All of the promising books and records of an individual or a corporation, a bank, a public authority, or other entity would be summoned before the Grand Jury. Obviously, they would be overwhelmed by the sheer mass of material.
2. All of these records would be "*retained*" by the Grand Jury for the purpose of being "*examined*" at some "*convenient place*" since the Grand Jury would solemnly agree that it could not possibly make head or tail out of the bulk.
3. The examination proposed would not necessarily be made by experts at all (including accountants, laboratory technicians, etc.), but by:
  - a. The Grand Jury (we would assume this would be rare);
  - b. The District Attorney;
  - c. The Attorney General;
  - d. Assistants to the Attorney General.
4. The "*experts*" or the District Attorney, the Attorney General or the Assistants to the Attorney General would analyze the documents and report thereon to the Grand Jury. This could take six months or even longer (see Chapter 277, Sec. 2, 2A).
5. "Any expert" other than the Attorney General, his assistants or the District Attorney, would be sworn to diligence and secrecy. (See Chapter 277, Sec. 5.)

So much for *who* would examine the documents, and we would take pains to stress that it would not merely be an "expert," and if an "expert" it might include a wide variety of that species. The proposed statute would permit the prosecutor to summon all of a particular category of the records of a bank, for example, and on a very insubstantial showing before the Grand Jury such records



could be kept for at least five months while the prosecutor examined them to see if he could develop a case.

Obviously an "expert" accountant could be sworn and the accountant could also make a similar examination for a similar purpose. So too with the records of a public authority, an insurance company, a trust company, a local restaurant, a loan company, Harvard University, or Cosa Nostra perhaps.

It should be obvious that if the District Attorney or Attorney General does not have the evidence before he summonses these records before the Grand Jury, he would be a dull boy indeed if such deficiency was not cured after two or three months of close examination, assuming of course that there was evidence of wrongdoing to be found.

What this bill (Senate 287) really does is to give subpoena power to the Attorney General or the District Attorney over just about any sort of physical evidence one could imagine, and even more, such evidence would, as a practical matter, be impounded for long periods of time.

### **Custody of the Evidence Impounded**

If there was no indictment, all of the books, records and other physical evidence would be returned to their bearer. But this would not happen if a true bill was found. If there was an indictment "based upon said documents . . . etc.," the prosecutor would move to have all of this evidence impounded pending the trial. The court probably would grant a motion of this kind.

### **Inspection Prior to Trial**

The bill does provide for inspection before trial by the prosecutor, the defendant or defense counsel, but even this is restricted. The bill reads:

" . . . and a defendant shall have the right to inspect *his own records* which have been so impounded, upon motion subject to such safeguards as the court may deem necessary to safeguard said records."

### **Experience of the Crime Commission**

In the Fifth Report of the Massachusetts Crime Commission (May 17, 1965), there is a recommendation for an investigation division in the department of the Attorney General. On page 67 of this report, it is said that the need for this special division arises from the fact that political corruption is peculiarly difficult to investigate effectively.

"Whether the suspected acts involve bribery, larceny, conspiracy or similar conduct, the evidence is nearly always extremely hard to find. Corrupt

financial transactions usually involve cash or the indirect transfer of funds or property through middlemen and under deliberately misleading accounting methods. Without records, evidence depends in most cases upon cooperation and testimony from a person who is himself a participant in the criminal act. Because of the extremely sensitive nature of political corruption law enforcement officials are themselves understandably reluctant to act except in clear cases."

This report continues further:

"it will be necessary for the proposed division to call witnesses before a Grand Jury in order to obtain evidence. Regular Grand Juries can assist in the investigation of corruption in some cases, but the investigation of deep seated corruption by a Grand Jury often requires continuous consideration of the same subject for weeks."

We think that this is the area in which Senate 287 of 1965 is intended to operate. We do not think that the prosecutor has been very often thwarted in getting an indictment in the more common cases which involve so-called complicated records and documents.

The Crime Commission recommends that the Attorney General's bill House 2134 of 1965 be enacted. At page 74 of the Crime Commission Report it is said:

"The Attorney General has sponsored a bill (H. 2134) authorizing him to subpoena the books and records of corporations, business trusts and agencies of government. The Commission recommends the passage of this bill. It is essential in any investigation into corruption and in many other investigations that relevant books and records of corporations, business trusts and agencies of government be made available."

### **Safeguards Found in Crime Commission Recommended Bill**

There does not appear to be any mention of Senate 287 in the Crime Commission Report where H. 2134 of 1965 is recommended. Because of the safeguards which are present in H. 2134, we think it should be considered here in connection with Senate 287. The Crime Commission recommended bill does not duplicate S. 287 entirely, and there is no mention there of "experts." The two bills are alike in that they would allow the Attorney General and the District Attorneys to subpoena the type of records which we think S. 287 is intended to cause to be produced for examination. We do not say that the bills are identical, by any means. It is significant in H. 2134 that the issuance of the subpoenas for the records "shall be subject to the general supervision of the Superior Court" and we think that the following language is highly important:

" . . . upon the motion of the person to whom said subpoena is directed, a judge of the Superior Court may order said subpoena quashed if in the judg-

ment of the court said subpoena has not been issued pursuant to a proper investigation being conducted by the Attorney General or the District Attorneys within the scope of their authority, or has been issued for personal or political reasons, or will result in the undue harassment of the person or corporation whose records are subpoenaed. . . . ”

We assume the Crime Commission appreciated the necessity for such safeguards none of which are present in the S. 287 referred to us.

It seems to us after our discussions of this bill (S. 287) and after listening to an exposition by those who favor such a measure, that there is a policy decision which must be made by our General Court.

If the recommendations of the Crime Commission are followed, and H. 2134 is adopted together with an investigating division in the Attorney General's office, the authority which S. 287 seeks to give (ostensibly to the Grand Jury, but really to the Attorney General or prosecutor) would not be so important. If the prosecutor is to have *his* investigating powers increased and enlarged, it is not also necessary to increase and enlarge these investigating powers through the Grand Jury.

On the other hand, if the Crime Commission recommendations for a strong investigating division in the Attorney General's office do not meet the approval of the people, Senate 287 becomes more significant.

The Judicial Council is not prepared to enter the policy making arena in this case particularly when it is our understanding that an agency of the executive branch seeks additional powers and finances from the General Court.

In the event that the General Court should take no action on Part VIII of the Fifth Report of the Crime Commission, what we have said here about the proposals of Senate 287 of 1965 will be of more importance.

### **Recommendations of the Judicial Council**

*First:* We do not recommend Senate 287 in its present form.

*Second:* We wish to have the full impact of this proposed legislation clearly understood by the General Court; it is NOT merely a provision where expert fingerprint men, ballisticians, pathologists, or even certified public accountants would examine the evidence and give the Grand Jurors the benefit of their skills and training.

*Third:* If the proposed legislation shall meet with the approval of the General Court, in principle, there are a number of safeguards which we would strongly recommend, and they are as follows:

1. Provision should be made so that the court would exercise control over the physical evidence to the end that justice would be done. The court should make the order as to where, and under what safeguards, the physical evidence should be examined.
2. If an expert is named or designated for the purpose of examination, he would be a "witness" and therefore the defendant would be entitled to his identity if there was an indictment. Since there is no attempt to limit the type of "expert" perhaps the proposal is deficient in this respect. It is possible that there would be leaks in the veil of secrecy where an expert was involved. His reports would have to be transcribed by those not sworn to secrecy.
3. The statute is unclear in the respect that it provides that the physical evidence shall be returned unless there is an indictment "based upon said documents, records, and other physical evidence." Would this mean that in every case where the physical evidence was retained, that it formed the basis for an indictment? Could this be argued?
4. The statute provides for impounding the evidence. This might prevent the preparation of a defense, and it might also prevent the carrying on of the usual business to which the records belonged. There should be a provision that the prosecutor would be obliged, at the expense of the commonwealth, to furnish copies of any physical evidence to the party to whom the original records belonged. The defense should not be obliged to pin-point the documents upon which it relies but should be able to obtain copies of any physical evidence. There is a real chance of oppression here.
5. Inspection of physical evidence should be permitted not only to the person indicted, but also to any person whose records have been summonsed before the grand jury. An individual might be indicted and the records in question, which he would need to prepare his defense, might belong to a corporation or a government agency. Unless he could inspect these, he could be prevented from preparing his defense.
6. During the entire periods when the records are in the possession of the prosecutor and the Grand Jury, there should



be provisions which would entitle the owner of the records to see them. The law is such that if this statute were enacted, the prosecutor could spirit away masses of records and retain possession of them for months at a time. This is to be avoided to prevent oppression and interference with normal business operations, and the operations of a government agency.

Our comments on the proposed change in the law are based on the lessons of legal history. Nothing herein is to be construed as criticism of the efforts of any prosecutor within the immediate past.

### EAVESDROPPING

## HOUSE . . . . 1965 . . . . No. 2843

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#### AN ACT FURTHER LIMITING THE PRACTICE OF EAVESDROPPING.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Chapter 272 of the General Laws is hereby  
2 amended by striking out section 99, as most recently amended  
3 by section 1 of chapter 449 of the acts of 1959, and inserting in  
4 place thereof the following section:—

5 *Section 99.* Whoever secretly or without the consent of  
6 either a sender or receiver, overhears, or attempts secretly, or  
7 without the consent of either a sender or receiver, to overhear, or  
8 to aid, authorize, employ, procure, or permit, or to have any  
9 other person secretly, or without the consent of either a sender or  
10 receiver, to overhear any spoken words at any place by using any  
11 electronic recording device, or a wireless tap or electronic tap,  
12 or however otherwise described, or any similar device or arrange-  
13 ment, or by tapping any wire to intercept telephone communica-  
14 tions, shall be guilty of the crime of eavesdropping and shall be  
15 punished by imprisonment for not more than two years or by  
16 a fine of not more than two thousand dollars, or both.

1 SECTION 2. Said chapter 272 is hereby further amended by  
2 striking out section 100, as most recently amended by section 2

3 of said chapter 449, and inserting in place thereof the following  
4 section:—

5 *Section 100.* Whoever for the purpose of eavesdropping as  
6 defined in section ninety-nine, either on his own account or as  
7 the servant or agent of another, permits or acquiesces in the in-  
8 stalling of any electronic recording device or any similar device  
9 or arrangement, or the tapping of any wire, shall be punished by  
10 imprisonment for not more than two years or by a fine of not  
11 more than two thousand dollars, or both. Any information re-  
12 ceived in violation of this section or section ninety-nine shall be  
13 inadmissible as evidence in any civil or criminal proceeding in the  
14 commonwealth.

The subject of wiretapping and eavesdropping and other practices in which electronic devices are used to obtain information has occupied considerable time during the 1965 legislative year.

A Special Commission established by Chapter 82 of the Resolves of 1964 was charged with the task of making an investigation and study relative to illegal use of electronic recording devices, wireless taps, electronic taps or other similar devices and arrangements.

This Special Commission was revived and continued by Chapter 69 of the Resolves of 1965. We assume this study will result in a report to the General Court in 1966.

During 1965, it was revealed at hearings in Washington that sophisticated electronic devices were being used by agencies of the United States government, especially the Internal Revenue service.

Thus, we find that both on the state and national level there has been legislative activity in the field of eavesdropping. The specific proposal referred to the Judicial Council is House Doc. 2843 (1965).

#### **ELIMINATION OF ALL EAVESDROPPING**

Under present law, Chapter 272, § 99, eavesdropping is prohibited and is made a crime *except* if it is done in accordance with an order issued by a justice of the Supreme Judicial Court or Superior Court upon application of the Attorney General or of a dis-

strict attorney. A proper showing of the need for such order must be made.

Under present law, eavesdropping has been placed upon a basis similar to but not identical with search and seizure. It can be done lawfully if it is done under the authority of an order of court. As there are no general search warrants, there is likewise no general eavesdropping allowed.

The proposed amendment to Chapter 272, § 99 would completely wipe out the right of the district attorney and Attorney General to seek an order of court to permit them to indulge in eavesdropping.

Specifically, such a drastic limitation on the district attorney, the Attorney General, and the police would seriously hamper their activities if it were necessary to resort to eavesdropping tactics in order to apprehend criminals or prevent crime.

Organized crime cannot be attacked if the police, *under judicial supervision*, are rendered impotent. But without judicial supervision, we might suffer the loss of liberty itself.

In addition to a total prohibition of all eavesdropping, it is also proposed by House Doc. 2843 (1965) to amend § 100 of Chapter 272 so as to make any person who acquiesces in the installation of eavesdropping devices subject to a fine and imprisonment.

Under the present section 100 of Chapter 272, such person would be subject to a fine and imprisonment unless there was a court order in effect allowing the installation to be made. Here again the proposed legislation aims to prohibit eavesdropping activities completely.

We do not recommend this proposed legislation. The only thing referred to the Judicial Council was H. 2843, and we cannot recommend that *all* eavesdropping be prohibited to the Commonwealth. Eavesdropping under judicial supervision, as our law now provides, is a protection for our society and a weapon against crime.

The Special Commission which was revived and continued under Chapter 69 of the Resolves of 1965, may go deeper into the eavesdropping picture and may recommend other legislation.

We would be interested in such recommendations.

**CO-CONSPIRATORS****Chapter 19****Resolves of 1965**

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RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL OF THE PRACTICE OF NAMING BUT NOT INDICTING CO-CONSPIRATORS IN CRIMINAL CASES.

1     *Resolved*, That the judicial council be requested to investi-  
2 gate the practice of naming but not indicting co-conspirators  
3 in criminal cases, and to include its conclusions and its  
4 recommendations, if any, in relation thereto, together with  
5 drafts of such legislation as may be necessary to give effect  
6 to the same, in its annual report for the current year.

Approved May 5, 1965

**NAMING "CO-CONSPIRATORS" BUT NOT  
INDICTING THEM**

There has been a great amount of interest in the recent past concerning the practice of naming but not indicting co-conspirators in criminal cases.

In our consideration of this practice, we have reviewed some of the newspaper stories which were published immediately after certain persons had been indicted and certain others merely named as co-conspirators, but not indicted.

If a person is named prominently as a co-conspirator and his picture appears in the newspapers along with those who have been indicted, a sizeable segment of the public may fail to make the distinction and may conclude that the named co-conspirators have also been indicted. We would agree that many people erroneously believe that an indictment alone indicates that there is no question as to guilt.

Throughout history, persons have received consideration because they cooperated with the prosecutor. This consideration may take the form of a disinclination on the part of the prosecutor to seek an indictment. In such case, the ends of justice are said to be served by merely indicating that the informer or person who cooperates is part of the conspiracy.

We do not recommend the practice of naming persons as co-conspirators in the indictment but not indicting them.

Because we are of the opinion, however, that it may be necessary to follow this practice in a certain class of cases; we do not recommend that any statute be enacted which would prohibit the practice of naming co-conspirators without indicting them.



## APPEALS BY THE COMMONWEALTH IN CRIMINAL CASES

In 1964 by Resolve Chapter 118, the Judicial Council was asked to investigate proposals to allow certain limited appeals by the Commonwealth in criminal cases. The Judicial Council made such an investigation and study, and made a report on this matter in its 40th Report at pps. 19-27.

In this 40th Report, five members of the Judicial Council opposed such appeals and five members were in favor of allowing certain limited appeals.

Further progress has been made in defining the constitutional rights of accused persons in matters related to search and seizure, arrest, and suppression of evidence.

The limits of the authority of the police have yet to be completely defined, and it may take several years before the decisions of our Supreme Judicial Court makes such a clear definition possible.

We have re-examined the matter of limited appeals in criminal cases, and after such re-examination, we find ourselves in complete agreement on the subject. We, therefore, recommend that the Commonwealth be permitted to take appeals from certain rulings of a judge on matters of law.

We only make this recommendation if the rights of the defendant are adequately protected. We, therefore, recommend the following:

## 1966 DRAFT ACT

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AN ACT AUTHORIZING APPEALS BY THE COMMONWEALTH ON QUESTIONS OF LAW  
UNDER CERTAIN CONDITIONS IN CRIMINAL PROSECUTIONS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Chapter 278 of the General Laws is hereby amended by inserting after section 28D the following section:—

Section 28E. An appeal may be taken by and on behalf of of the commonwealth of Massachusetts by the district attorneys or the attorney general from the superior court to the supreme judicial court in all criminal cases from a decision, order or judgment of the court sustaining a motion to dismiss an indictment or complaint, or for other relief under section forty-seven A of chapter two hundred and seventy-seven of the General Laws which bars further prosecution under the indictment or complaint.

A similar appeal may be taken to the supreme judicial court from an order, decision or judgment in the district court or in the superior court suppressing evidence prior to trial.

Such appeal shall be taken within ten days after such order, decision or judgment has been entered, and in any case before the defendant has been placed in jeopardy under established rules of law. The appeal shall be diligently prosecuted.

Pending the prosecution and determination of the appeal, trial shall be stayed, and the defendant shall be released on personal recognizance.

All expenses of an appeal taken by the Commonwealth hereunder shall be borne by the Commonwealth, including reasonable fees of defense counsel, subject to approval of a justice of the supreme judicial court, and costs of the defendant's brief in the supreme judicial court.

Rules of practice and procedure with respect to appeals authorized by this section shall be the same as those now applicable to criminal appeals under sections thirty-three A through thirty-three G, inclusive, of chapter two hundred and seventy-eight of the General Laws.

No appeal shall be allowed hereunder the result of which will be to place the defendant in double jeopardy under established rules of law.

Rules of practice and procedure with respect to appeals authorized by this section shall be the same as those now applicable to criminal appeals under sections thirty-three A through thirty-three G, inclusive, of chapter two hundred and seventy-eight of the General Laws.

No appeal shall be allowed hereunder the result of which will be to place the defendant in double jeopardy under established rules of law.

"Judge Thomson concurs with the opinion of the Council in regard to the above draft act, but recommends an amendment so that the defendant *may* be released on personal recognizance in the discretion of the courts. As the draft act stands, it is provided that a defendant *shall* be released if the Commonwealth appeals in this limited class of cases."

The recommended legislation above is substantially similar to legislation recommended in 1964 in H. 1508 and in H. 2125 of 1965. We have made revisions to reflect the changes made in our law by Chapter 617 of the Acts of 1965. This new simplification of pleadings in criminal cases became effective on October 4, 1965 and reads as follows:

AN ACT PROVIDING FOR THE SIMPLIFICATION OF PLEADINGS IN CRIMINAL CASES.

SECTION 1. Chapter 277 of the General Laws is hereby amended by inserting after section 47, under the caption PLEADINGS AND MOTIONS BEFORE TRIAL, the following section:—

Section 47A. The pleadings in criminal proceedings shall be the indictment or complaint, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers, challenges to the array and to the manner of selection of grand or traverse jurors, and motions to quash are hereby abolished, and any defense and objections, which could have been raised before trial by

one or more of them prior to October fourth, nineteen hundred and sixty-five, shall be raised only by motion to dismiss or by a motion to grant appropriate relief, as hereinafter provided.

Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

Defenses and objections based on defects in the institution of the prosecution or in the indictment or complaint, other than a failure to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. Such motion shall include all such defenses and objections then available to the defendant and shall set out such defenses in separately numbered paragraphs with particularity. Any facts relied upon in support of any of said defenses shall be stated in an affidavit attached to said motion. Failure to present any such defense or objection shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceedings.

The motion shall be made before the plea is entered, but may either by a general court rule or by order of the justice be made within a reasonable time thereafter.

A motion before trial raising such defenses or objections shall be determined before trial, unless the court orders that it be referred for determination at the trial of the general issue.

If a motion is determined adversely to the defendant, he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or complaint, it may order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or complaint. Nothing in this section shall be deemed to affect the provisions of any statute relating to periods of limitations.

SECTION 2. The statutory and common law of the commonwealth applicable to the pleas, demurrers, challenges, and motions to quash abolished by section forty-seven A of chapter two hundred and seventy-seven of the General Laws, inserted by section one of this act, shall continue to apply to any motion filed under said section forty-seven A of said chapter two hundred and seventy-seven and covering the same matter as would have been covered, prior to the effective date of this act, by such abolished plea, demurrer, challenge, or motion to quash.

SECTION 3. This act shall take effect on October fourth, nineteen hundred and sixty-five.

*Approved August 9, 1965.*

## POST CONVICTION PROCEDURE

HOUSE . . . . 1965 . . . . No. 143

## APPENDIX B

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AN ACT ESTABLISHING THE UNIFORM POST-CONVICTION PROCEDURE ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. The General Laws are hereby amended by in-  
2 serting after chapter 248 thereof the following new chapter:—

3 CHAPTER 248A.

4 UNIFORM POST-CONVICTION PROCEDURE ACT.

5 Section 1. Any person convicted of a felony and incarcer-  
6 ated under sentence of death or imprisonment who claims that  
7 the sentence was imposed in violation of the Constitution of  
8 the United States or the Constitution or laws of this State, or  
9 that the court was without jurisdiction to impose the sentence,  
10 or that the sentence exceeds the maximum authorized by law,  
11 or that the sentence is otherwise subject to collateral attack  
12 upon any ground of alleged error heretofore available under a  
13 writ of *habeas corpus*, writ of *coram nobis*, or other common law  
14 or statutory remedy, may institute a proceeding under this  
15 chapter to set aside or correct the sentence, provided the al-  
16 leged error has not been previously and finally litigated or  
17 waived in the proceedings resulting in the conviction or in any  
18 other proceedings that the petitioner has taken to secure relief  
19 from his conviction.

20 The remedy herein provided is not a substitute for nor does  
21 it affect any remedies which are incident to the proceedings in  
22 the trial court, or any remedy of direct review of the sentence  
23 or conviction but, except as otherwise provided in this chap-  
24 ter, it comprehends and takes the place of all other common  
25 law and statutory remedies which have heretofore been avail-  
26 able and for challenging the validity of incarceration under sen-  
27 tence of death or imprisonment, and shall be used exclusively  
28 in lieu thereof. A petition for relief under this chapter may be  
29 filed at any time.

30 Section 2. The supreme judicial court, or a justice thereof,  
31 may in accordance with its rules, entertain a proceeding under  
32 this chapter in an exercise of its original jurisdiction. In this  
33 event, the provisions of this chapter, to the extent applicable,  
34 shall govern the proceeding.



35 *Section 3.* Except in a proceeding brought under section  
36 two of this chapter, the proceeding is commenced by filing a  
37 petition verified by the petitioner with the clerk of the court  
38 in which the conviction took place. Facts within the personal  
39 knowledge of the petitioner and the authenticity of all docu-  
40 ments and exhibits included in or attached to the petition must  
41 be sworn to affirmatively as true and correct. The supreme  
42 judicial court may by rule prescribe the form of verification.  
43 The clerk shall docket the petition upon its receipt and bring  
44 it promptly to the attention of the court and the district  
45 attorney.

46 *Section 4.* The petition shall identify the proceeding in  
47 which the petitioner was convicted, give the date of the entry  
48 of the judgment and sentence complained of, specifically set  
49 forth the grounds upon which the petition is based, and clearly  
50 state the relief desired. All facts within the personal knowledge  
51 of the petitioner shall be set forth separately from other alle-  
52 gations of facts, and shall be verified as provided in section  
53 three of this chapter. Affidavits, records, or other evidence  
54 supporting its allegations shall be attached to the petition or  
55 the petition shall state why they are not attached. The peti-  
56 tion shall also identify any previous proceedings that the  
57 petitioner has taken to secure relief from his conviction. Argu-  
58 ment, citations, and discussion of authorities shall be omitted  
59 from the petition.

60 *Section 5.* The petition may allege that the petitioner is  
61 unable to pay the costs of the proceeding or to employ counsel.  
62 If the court is satisfied that the allegation is true, it shall order  
63 that the petitioner proceed as a poor person, and appoint coun-  
64 sel for him. If after judgment, a review is sought by the pe-  
65 titioner, and the hearing court is of the opinion that the review  
66 is requested in good faith, and finds that the petitioner is un-  
67 able to pay the costs of the review, the court shall order that  
68 all necessary costs and expenses incident thereto, including all  
69 court costs, stenographic services, printing, and reasonable  
70 compensation for legal services, be paid by the county in which  
71 the judgment is rendered.

72 *Section 6.* Within thirty days after the docketing of the  
73 petition, or within any further time the court may fix, the  
74 State shall respond by answer or motion. No further pleadings  
75 shall be filed except as the court may order. The court may  
76 grant leave, at any time prior to entry of judgment, to with-  
77 draw the petition. The court may make appropriate orders  
78 as to the amendment of the petition or any other pleading, or as  
79 to pleading over, or filing further pleadings, or extending the  
80 time of the filing of any pleading other than the original

81 petition.

82 *Section 7.* Except in a proceeding brought under section 2  
83 of this chapter, the petition shall be heard in the court in which  
84 the conviction took place and before any judge thereof. The  
85 court may receive proof by affidavits, depositions, oral testi-  
86 mony, or other evidence, and may order the petitioner brought  
87 before it for the hearing. If the court finds in favor of the  
88 petitioner, it shall enter an appropriate order with respect to  
89 the judgment or sentence in the former proceedings, and any  
90 supplementary orders as to arraignment, retrial, custody,  
91 bail, discharge, correction of sentence, or other matters that  
92 may be necessary and proper. The order making final disposi-  
93 tion of the petition shall clearly state the grounds on which  
94 the case was determined and whether a federal or a state right  
95 was presented and decided. This order constitutes a final  
96 judgment for purposes of review.

97 *Section 8.* All grounds for relief claimed by a petitioner  
98 under this chapter must be raised in his original or amended  
99 petition, and any grounds not so raised are waived unless the  
100 court on hearing a subsequent petition finds grounds for re-  
101 lief asserted therein which could not reasonably have been  
102 raised in the original or amended petition.

103 *Section 9.* A final judgment entered under this chapter may  
104 be reviewed by the supreme judicial court of this state on ap-  
105 peal brought by either the petitioner or the state within six  
106 months from the entry of the judgment.

107 *Section 10.* This chapter shall be so interpreted and con-  
108 strued as to effectuate its general purpose to make uniform the  
109 law of those states which enact it.

110 *Section 11.* This chapter may be cited as the Uniform Post-  
111 Conviction Procedure Act.

1 SECTION B. If any provision of this act or the application  
2 thereof to any person or circumstances is held invalid, the in-  
3 validity shall not affect other provisions or applications of the  
4 act which can be given effect without the invalid provision or  
5 application, and to this end the provisions of this act are  
6 severable.

The purpose of this uniform act is to provide a person sentenced to death or imprisonment with another method to raise the issue that such sentence was illegal, unconstitutional, or otherwise unlawful.

Historically, the remedies available after conviction (other than the appeal) have been *habeas corpus* and *coram nobis*. In addition, the writ of error has generally been part of the common law

and is part of our statutory law by Chap. 250, Sections 9-13 of the General Laws.

The writ of error has usually been deemed to be an independent or collateral attack on the conviction and sentence. A writ of error is not an appeal, but it does seek to re-examine a final judgment in a criminal case to determine whether there has been any error in law or in fact. However, errors of fact are not errors made at the trial.

Writs of error issue upon application except in capital cases and certain other felony cases (Chapter 250, § 11).

*Habeas corpus* at common law was in the main, an attack on jurisdiction over the defendant or over the subject matter, or both.

*Habeas corpus* is provided for in Chapter 248 of the General Laws. A person who is imprisoned or restrained of his liberty may, as of right and of course, prosecute a writ of *habeas corpus*, according to the provisions of Chapter 248 of the General Laws, in order to obtain release from such imprisonment or restraint.

*Habeas corpus* is not an appeal, and if there is legal cause shown for the imprisonment or restraint, the prisoner traditionally will not be released on a *habeas corpus* writ.

*Coram nobis* simply means "before us." This type of writ is obsolete in the Commonwealth of Massachusetts. Originally, it was brought to allow the court where the sentence had been passed to correct some error, and usually this was an error in fact not known at the time of trial. In the United States, *coram nobis* was even more restricted than it was in England.

In our 37th Report for 1961 at page 19, we discussed *coram nobis* and did not recommend that it be reintroduced into our law.

In the past few years, there has been a re-examination of the role of the federal *habeas corpus* writ. Originally, it was restricted to cases where the court lacked jurisdiction over the crime or the person, or where a prisoner was held without due process of law. This traditional concept is undergoing a change.

In the case of *Fay v. Noia*, 372 U. S. 391, the United States Supreme Court indicated that any imprisonment imposed contrary to the federal constitution can be challenged by *habeas corpus* in the federal courts.

It is against this background then, that we examine the proposals for a post-conviction procedure act which would provide additional methods to review the case.

Because of the fact that a Special Committee on Minimum Standards for the Administration of Criminal Justice of the American Bar Association is currently studying a revised draft of the Uniform Post-Conviction Procedure Act, and will not complete its

work until the spring of 1966, we are retaining this matter for our further consideration. In the interim, we are of the opinion that the procedure in Massachusetts is such that any convicted person will have his rights adjudicated and preserved under our existing law. We reserve our decision on the question as to whether or not additional remedies may be desirable in this Commonwealth.

**UNIFORM RENDITION OF PRISONERS AS  
WITNESSES IN CRIMINAL PROCEEDINGS ACT**

**HOUSE . . . . 1965 . . . . No. 143**

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**APPENDIX E**

**AN ACT ESTABLISHING THE UNIFORM RENDITION OF PRISONERS AS WITNESSES IN  
CRIMINAL PROCEEDINGS ACT.**

*Be it enacted by the Senate and House of Representatives in General Court  
assembled, and by the authority of the same, as follows:*

1    SECTION 1. Chapter 233 of the General Laws is hereby  
2 amended by inserting after section 13D thereof the following  
3 new sections:—

4    *Section 13E* As used in sections thirteen E through thir-  
5 teen N of this chapter,

6    (a) “Witness” means a person who is confined in a penal  
7 institution in any state and whose testimony is desired in  
8 another state in any criminal proceeding or investigation by a  
9 grand jury or in any criminal action before a court.

10    (b) “Penal institutions” includes a jail, prison, penitentiary,  
11 house of correction, or other place of penal detention.

12    (c) “State” includes any state of the United States, the  
13 District of Columbia, the Commonwealth of Puerto Rico, and  
14 any territory of the United States.

15    *Section 13F.* A judge of a state court of record in another  
16 state, which by its laws has made provision for commanding  
17 persons confined in penal institutions within that state to at-  
18 tend and testify in this state, may certify (1) that there is a  
19 criminal proceeding or investigation by a grand jury or a  
20 criminal action pending in the court, (2) that a person who is  
21 confined in a penal institution in this state may be a material  
22 witness in the proceeding, investigation, or action, and (3) that  
23 his presence will be required during a specified time. Upon  
24 presentation of the certificate to any judge having jurisdiction  
25 over the person confined, and upon notice the Attorney Gen-  
26 eral, the judge in this state shall fix a time and place for a



27 hearing and shall make an order directed to the person having  
28 custody of the prisoner requiring that the prisoner be pro-  
29 duced before him at the hearing.

30 *Section 13G.* If at the hearing the judge determines (1) that  
31 the witness may be material and necessary, (2) that his attend-  
32 ing and testifying are not adverse to the interests of this state  
33 or to the health or legal rights of the witness, (3) that the laws  
34 of the state in which he is requested to testify will give him  
35 protection from arrest and the service of civil and criminal  
36 process because of any act committed prior to his arrival in  
37 the state under the order, and (4) that as a practical matter  
38 the possibility is negligible that the witness may be subject to  
39 arrest or to the service of civil or criminal process in any state  
40 through which he will be required to pass, the judge shall  
41 issue an order, with a copy of the certificate attached, (a) di-  
42 recting the witness to attend and testify, (b) directing the per-  
43 son having custody of the witness to produce him, in the  
44 court where the criminal action is pending, or where the grand  
45 jury investigation is pending, at a time and place specified in  
46 the order, and (c) prescribing such conditions as the judge shall  
47 determine.

48 *Section 13H.* The order to the witness and to the person  
49 having custody of the witness shall provide for the return of  
50 the witness at the conclusion of his testimony, proper safe-  
51 guards on his custody, and proper financial reimbursement or  
52 prepayment by the requesting jurisdiction for all expenses in-  
53 curred in the production and return of the witness, and may  
54 prescribe such other conditions as the judge thinks proper or  
55 necessary. The order shall not become effective until the  
56 judge of the state requesting the witness enters an order  
57 directing compliance with the conditions prescribed.

58 *Section 13I.* This act does not apply to any person in this  
59 State confined as insane or mentally ill or as a defective de-  
60 linquent or under sentence of death.

61 *Section 13J.* If a person confined in a penal institution in  
62 any other state may be a material witness in a criminal action  
63 pending in a court of record or in a grand jury investigation in  
64 this State, a judge of the court may certify (1) that there is a  
65 criminal proceeding or investigation by a grand jury or a  
66 criminal action pending in the court, (2) that a person who is  
67 confined in a penal institution in the other state may be a  
68 material witness in the proceeding, investigation, or action,  
69 and (3) that his presence will be required during a specified  
70 time. The certificate shall be presented to a judge of a court  
71 of record in the other state having jurisdiction over the pris-  
72 oner confined, and a notice shall be given to the Attorney Gen-

73 eral of the state in which the prisoner is confined.

74 *Section 13K.* The judge of the court in this state may  
75 enter an order directing compliance with the terms and con-  
76 ditions prescribed by the judge of the state in which the wit-  
77 ness is confined.

78 *Section 13L.* If a witness from another state comes into or  
79 passes through this state under an order directing him to at-  
80 tend and testify in this or another state, he shall not while in  
81 this state pursuant to the order be subject to arrest or the  
82 service of process, civil or criminal, because of any act com-  
83 mitted prior to his arrival in this state under the order.

84 *Section 13M.* Sections thirteen E through thirteen N of  
85 this chapter shall be so construed as to effectuate their general  
86 purpose to make uniform the law of those states which enact  
87 them.

88 *Section 13N.* This act may be cited as the Uniform Rendi-  
89 tion of Prisoners as Witnesses in Criminal Proceedings Act.

1 SECTION 2. If any provision of this act or the application  
2 thereof to any person or circumstance is held invalid, the in-  
3 validity shall not affect the other provisions or applications of  
4 the act which can be given effect without the invalid provision  
5 or application, and to this end the provisions of this act are  
6 severable.

In 1937, certain provisions were added to Chapter 233 of the General Laws for the purpose of securing the attendance of out of state witnesses in criminal proceedings in Massachusetts. The question arising now is whether or not a witness who is in a penal institution can be brought to Massachusetts for the purposes of a criminal proceeding.

It is useful to have a uniform law under which all of our states will allow prisoners to be transported to other states to testify in criminal proceedings.

The recommended legislation seems to us to contain the necessary safeguards to assure that such transport of prisoners and their appearance in Massachusetts will be accomplished under judicial supervision. We believe that the rights of the witness have been protected. We also point out that the costs of transportation and maintenance are paid by the state which seeks to have the witness appear before its court. We, therefore, recommend the *Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act* as an amendment to Chapter 233 of the General Laws.

## **BREAKING AND ENTERING MOTOR VEHICLE WITH INTENT TO COMMIT A MISDEMEANOR**

The present statute does not cover breaking and entering a *vehicle*.

The proposed bill (S. 281), would add the words "*or motor vehicle*."

We recommend that the amendment to Chapter 266, § 16A be drafted so as to cover any kind of vehicle, whether or not it has a motor in it.

This would then include such things as railroad cars, house-trailers, and other wheeled devices. The purpose of amending this statute is to penalize those who break and enter automobiles. We think that it might be well to make the amendment all inclusive.

## **1966 DRAFT ACT**

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*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Chapter 266 of the General Laws is hereby amended by striking out section 16A, as appearing in the Tercentenary Edition, and inserting in place thereof the following section:—

Section 16A. Whoever in the nighttime or daytime breaks and enters a building, ship, vessel or vehicle with intent to commit a misdemeanor shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months, or both.

## **BREAKING AND ENTERING MOTOR VEHICLES WITH INTENT TO COMMIT A FELONY**

We have recommended stronger measures to deal with those who break and enter vehicles with intent to commit a misdemeanor.

If the intent to commit a felony is established, we believe that the punishment should be more severe than in the case of the lesser offense. We, therefore, recommend the following which is Senate No. 280 of 1965, except that we have substituted the words "any vehicle" for the words "*motor vehicle*" in the original bill.

## **1966 DRAFT ACT**

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*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:*

Chapter 266 of the General Laws is hereby amended by inserting after section 19 the following section:—

Section 19A. Whoever breaks and enters or enters without breaking, in the daytime or nighttime, any vehicle with intent to commit a felony, shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than five hundred dollars and imprisonment in the house of correction for not more than two years.

**MINIMUM SENTENCE FOR CONVICTION OF  
THEFT OF MOTOR VEHICLE**

**HOUSE . . . . 1965 . . . . No. 367**

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AN ACT PROVIDING A MINIMUM SENTENCE FOR CONVICTION OF THEFT OF A MOTOR VEHICLE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 266 of the General Laws is hereby amended by strik-  
2 ing out section 28, as most recently amended by section 2 of  
3 chapter 160 of the acts of 1959, and inserting in place thereof  
4 the following section:—

5 *Section 28.* Whoever steals a motor vehicle or trailer, or re-  
6 ceives or buys a motor vehicle or trailer knowing the same to  
7 have been stolen, or conceals any motor vehicle or trailer thief  
8 knowing him to be such, or conceals any motor vehicle or trailer  
9 knowing the same to have been stolen, or takes a motor vehicle  
10 or trailer without the authority of the owner and steals from it  
11 any of its parts or accessories, or without the authority of the  
12 owner operates a motor vehicle after his right to operate with-  
13 out a license has been suspended or after his license to operate  
14 has been suspended or revoked and prior to the restoration of  
15 such right or license to operate or to the issuance to him of a  
16 new license to operate, shall be punished by imprisonment in  
17 the state prison for not more than ten years or by imprisonment  
18 in jail or house of correction for not less than thirty days nor  
19 more than two and one half years.

The proposed amendment to section 28 of Chapter 266 would impose a mandatory jail sentence of no less than thirty (30) days. As present there is no such mandatory minimum sentence.

It should be kept in mind that this suggested amendment would provide the same minimum jail term for the receiver of stolen cars, the auto thief, or other true criminal as would be applied to an irresponsible young person who operated after his license was suspended or who took a car for a “joy ride” without real larcenous intent.

We do not underestimate the problem of the police. Commis-



sioner Edmund L. McNamara of the Boston Police Department pointed out to the General Court earlier this year that since 1959 motor vehicles with a value of 19 million dollars have been stolen or misappropriated in the city of Boston. The stolen car rate has increased by 180% since 1959.

The police feel that measures such as the minimum sentence will help reduce the "stolen" car crime rate. They also suggest that the unauthorized use of a motor vehicle be made a felony in order to deter young offenders.

We do not think that either of these alternatives will provide a workable solution to the "stolen" car problem. We believe that most "stolen" cars are taken without intent to permanently deprive the owner thereof.

The theft of a motor vehicle is even now a felony and carries a maximum penalty of not more than ten years in state prison. If this maximum penalty were always imposed on professional car thieves, we would still have a host of youthful offenders who simply make off with a car for an evening of joy riding. We cannot treat these offenders in the same manner, and we hesitate to recommend a mandatory sentence for them.

We recommend to the General Court that consideration be given to a statute which would require automobile manufacturers to equip new cars with a protective device designed to make it difficult or impossible to start the vehicle without a key.

We further recommend that a fine or other penalty be imposed on persons who leave a vehicle unattended with the key in the lock. Such persons may not be proper persons to operate motor vehicles.

Chapter 90, § 13 requires the operator to lock the car in the following language:

" . . . No person having control or charge of a motor vehicle shall allow such vehicle to stand in any way and remain unattended without first locking or making it fast or effectively setting the brakes thereon, and stopping the motor of said vehicle. . . . "

But it has been held in *Sullivan v. Griffin* (1954) 318 Mass. 359, that a person who leaves his keys in the car may not necessarily be held liable on negligence.

Section 13 of chapter 90, as it now stands, is a statement of certain "safety precautions for proper operation and parking" of vehicles.

Under Section 20 of Chapter 90, it might seem possible to impose a fine on any person who allowed his vehicle to remain unattended without first locking it, but the words in section 13 are vague and inexact. If the vehicle was made "fast" or the brakes were set, there might be no violation.

We would recommend a revision of this section to make it clear that leaving the keys in an unattended vehicle was a definite offense subject to a punishment under section 20.

If the General Court wished to make such an offense noncriminal, we recommend a procedure such as section 20A of chapter 90 where parking offenders are fined with no criminal record being attached to them.

Unless we impose some responsibility on the manufacturer and the owner and operator, we cannot assist our police to handle this problem.

As a matter of policy, we would definitely discourage the mandatory thirty day term.

### III. Evidence

**HOUSE . . . . 1965 . . . . No. 2662**

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#### UNIFORM RULES OF EVIDENCE

We have not printed the bill here as it contains seventy-two proposed rules and requires thirty pages of type. The proposed set of rules is a massive dose, and we do not believe that such wholesale revisions of practice and proceeding should be seriously suggested to the General Court unless there has been long and careful study.

An "Evidence Code" of 1362 sections was enacted this year by the California assembly. This was the result of a nine-year study by the California Law Revision Commission.

The California group did not favor the Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform State Laws for various reasons including the fact that such a code would change the law of California, that California had many provisions in its law of evidence which had served it well, but which were not in the Uniform Rules; that the draftsmanship was "defective," and that the "need for nationwide uniformity in the law of evidence is not of sufficient importance that it should outweigh these other considerations."

The California Law Revision Commission published a 400 page recommendation, after nine years of intensive work, before any major change was made in that state.

We understand that an evidence code was proposed for New Jersey and a study is being made there.

To properly assess the nature and scope of a new code of evidence in Massachusetts would require a coordinated task force. We believe there is merit in the proposal for a new code of evidence

and would certainly assume the guidance of such a project. We do not believe such a study can be made without adequate financial and research assistance.

We cannot recommend H. 2662 of 1965 under any circumstances.

PRIVATE CONVERSATIONS BETWEEN HUSBAND  
AND WIFE AS EVIDENCE

HOUSE . . . . 1965 . . . . No. 1574

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AN ACT MAKING PRIVATE CONVERSATIONS BETWEEN HUSBANDS AND WIVES ADMISSIBLE AS EVIDENCE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Chapter 233 of the General Laws is hereby  
2 amended by striking out section 20, as most recently amended  
3 by section 3 of chapter 657 of the acts of 1951, and inserting in  
4 place thereof the following section:—

5 *Section 20.* Any person of sufficient understanding, al-  
6 though a party, may testify in any proceeding, civil or criminal,  
7 in court or before a person who has authority to receive evi-  
8 dence, except as follows:—

9 *First,* Except as otherwise provided in section seven of chap-  
10 ter two hundred and seventy-three, neither husband nor wife  
11 shall be compelled to testify in the trial of an indictment, com-  
12 plaint or other criminal proceeding against the other.

13 *Second,* The defendant in the trial of an indictment, com-  
14 plaint or other criminal proceeding shall, at his own request,  
15 but not otherwise, be allowed to testify; but his neglect or  
16 refusal to testify shall not create any presumption against him.

1 SECTION 2. Section 7 of chapter 273 of the General Laws,  
2 as appearing in the Tercentenary Edition, is hereby amended  
3 by striking out the last sentence.

The apparent purpose of the proposed amendment Chapter 233, § 20 is to allow a husband or wife to testify against the other in *civil cases* as to private conversations between them.

At present, with an exception which is not too important here, neither husband nor wife can testify as to private conversations between them in a civil action.

The amendment would not change the present law which states that neither husband nor wife shall be compelled to testify against the other in a criminal case.

We have not been able to discover any sound reason for casting

out of our law the time honored principle that neither husband nor wife shall testify as to private conversations with the other. This is a legal tradition which deserves protection.

The second proposal in this bill is to amend § 7, of Chapter 273. This chapter deals with desertion, nonsupport, and illegitimacy. Section 7 concerns the evidence and proof required in these cases. We do not recommend this bill.

STATEMENTS OF DECEASED PERSONS AS  
EVIDENCE IN CRIMINAL PROCEEDINGS

HOUSE . . . 1965 . . . No. 3168

AN ACT RELATIVE TO THE ADMISSIBILITY OF EVIDENCE OF DECEASED PERSONS IN  
CERTAIN CRIMINAL PROCEEDINGS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 233 of the General Laws is hereby amended by strik-
- 2 ing out section 65 and inserting in place thereof the following:—
- 3 *Section 65.* In any action or other civil proceeding, and in any
- 4 criminal proceeding involving a felony, a declaration of a person
- 5 who has since deceased shall not be inadmissible in evidence as
- 6 hearsay or as a private conversation between husband and wife,
- 7 as the case may be, if the court finds that it was made in good
- 8 faith and upon the personal knowledge of the declarant. The
- 9 preliminary findings by the court, shall, in criminal cases, if the
- 10 evidence is admitted, by subject to like findings by the jury on
- 11 proper instructions by the court.

Chapter 233, § 65 now provides that in *civil cases* the declaration of a deceased person may be used in evidence under certain conditions.

Chapter 233, § 65 reads as follows:

*“Admissibility of declaration of decedent.* In any action or other civil judicial proceedings, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.”

Under the present law, a declaration of a deceased person cannot be used as evidence in a criminal case. The Commonwealth cannot produce a statement of a dead person as evidence to convict an accused person. It is obvious that the accused cannot cross examine the deceased, and that if the Commonwealth could use evidence of this kind, the accused might be deprived of his consti-



tutional right to confront the witnesses against him. It is also true that the defendant cannot produce evidence of this nature. The legal principle can be found in the case of *Commonwealth v. Gallo*, 275 Mass. 320, page 355, where there is a discussion of Chapter 233, § 65. The court said that this section was not applicable to criminal proceedings. In the *Gallo* case, the defendant wished to introduce evidence of the declaration of a person who died before the trial.

We do not think that the decision of *Commonwealth v. Gallo* should be enlarged to admit the declaration of a deceased person in a criminal case except in a criminal case where the issues are the same and where the defendant has had an opportunity to cross examine the deceased person and where a stenographic transcript is used.

### EMINENT DOMAIN EVIDENCE OF COMPARABLE SALES

## HOUSE . . . . 1965 . . . . No. 2496

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#### AN ACT RELATIVE TO THE INTRODUCTION OF CERTAIN EVIDENCE IN EMINENT DOMAIN CASES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 233 of the General Laws is hereby amended by in-  
2 serting after section 79F the following section:—

3 *Section 79G. (a)* In the trial of any petition for assessment of  
4 damages resulting from the taking of property under eminent  
5 domain powers, the sale price or other relevant circumstances  
6 surrounding the transfer of comparable property shall not be in-  
7 admissible by reason of the hearsay nature of such evidence;  
8 provided, that the party seeking to introduce such evidence  
9 furnishes the opposing party, at least sixty days before the trial,  
10 with a list of such transfers as he intends to introduce. If there be  
11 objection to the introduction of any such evidence, the objecting  
12 party shall signify his reasons, before a jury is empanelled, to  
13 the trial judge who shall, after a hearing in the absence of the  
14 jury, decide whether or not to allow such evidence to be sub-  
15 mitted to the jury, and if he is of the opinion that such evidence  
16 is reliable and otherwise competent and relevant he may admit  
17 it regardless of its hearsay nature. The objecting party shall,  
18 at the time the evidence is admitted, have all the usual rights of  
19 cross examination. Such evidence shall also be admissible in  
20 jury waived cases subject to the same conditions and provisions.  
21 *(b)* No witness testifying for either party in an eminent do-

22 main petition shall be permitted to express an opinion of value  
23 based in whole or in part on transfers of similar property in which  
24 sale he did not participate as principal or agent unless the pro-  
25 visions of paragraph (a) above are complied with and, after a  
26 hearing, the trial judge determines that such evidence is com-  
27 petent, relevant and reliable.

The practical effect of a statute such as H. 2496 is to educate counsel for both the taking authority and the property owner as to evidence of comparable sales which either intends to use at trial. Such evidence would be submitted sixty days prior to trial, and if this is not done, only an owner or his agent who participated in the sale of "comparable" property could testify.

Should either party feel, after the list of comparable sales has been submitted, that some or all of the sales were not comparable, the trial judge would conduct a preliminary hearing on the matter in the absence of the jury.

We would first point out that this new proposal would only make a small dent in the procedural problem involved.

The fact that property, which is comparable to the property taken by eminent domain, has been sold for a given price is not necessarily admissible in evidence. Such fact may assist a qualified appraiser to reach the stage where he can form an opinion. In forming such opinion, he can consider sales of comparable property. If during his testimony he is asked to give some of the bases of his opinion, he can refer to sales of comparable property among other considerations.

We do not believe that lists of sales of "comparable property" should become legally admissible evidence and this statute would probably let them in through the back door.

Our investigation of the subject matter of this bill led us to contact the Massachusetts Board of Real Estate Appraisers. Spokesmen for that group indicate that "some progressive legislation is necessary" but that H. 2496 is not the answer.

The Massachusetts Association of Real Estate Boards concurs with the Appraisers Association in opposition to this bill.

It is pointed out to us that "many competent appraisers whose services are in demand as witness usually do less brokerage work and thus participate in fewer transfers. It would seem that opinions as to value now based in part on transfers of similar property, in which transfer the witness did not participate, and which are now admissible, would not be admissible under (b) of House 2496 of 1965 unless the pre-trial disclosures of (a) are satisfied."

We regret that the Association of Real Estate Boards has not seen fit to discuss the larger question of pre-trial discovery of the whole appraisal report.

Our attention has been called to the new rule in effect in the New York Court of Claims which requires both the taking authority and the claimant to make a complete pre-trial disclosure of the appraisal data.

The new rule is as follows:

*Rule 25-A*

1. Within six (6) months of the filing of a claim in an appropriation case the parties shall file with the Clerk of the Court four (4) copies of their appraisals which shall set forth separately as to vacant land and improvements the evaluations and data upon which such evaluations are based, including but not limited to the before value of the property, the after value, direct, consequential and total damages and details of appropriations, comparable sales and other factors utilized. If all of the details required by Section 16 (3) of the Court of Claims Act relating to alleged comparable sales are included in the appraisal report prescribed herein, the same shall be deemed compliance with Section 16 (3) of the Court of Claims Act.

2. When the Clerk shall have received the appraisal reports of all parties he shall send to each attorney of record a copy of the appraisal report of all other parties to the claim.

3. Within thirty (30) days after the service upon a party of an appraisal report of any other party, any party to the proceeding may file and serve on all other parties an amended or supplemental appraisal report or reports.

4. Within sixty (60) days after the final filing and service of appraisal reports or amended or supplemental appraisal reports a party may because of unusual developments or circumstances, make a motion for permission to file and serve an additional appraisal report or amended or supplemental reports, the granting of which application shall rest in the sound discretion of the court as the interests of justice may require.

5. A party confronted with unusual and special circumstances requiring more time than prescribed above for the filing of appraisal reports may make an application upon notice for the extension of time which extension, in the sound discretion of the court, may be granted for such period and under such conditions as the court deems proper.

6. (A) Upon the trial of a claim for the appropriation of property the parties shall be precluded from offering any proof on matters not contained in the appraisal reports or amended or supplemental appraisal reports as required by this rule; however, a party may, notwithstanding his failure to comply with this rule, offer proof on matters contained in Bills of Particulars and Examinations before Trial in accordance with the usual procedures and rules of this court.

(B) This rule shall not apply to a party who files a statement within six (6) months of the filing of a claim to the effect that he will not introduce expert evidence of value and damages upon the trial.

7. Six (6) months after the filing of a claim for damages for the appropriation of property a judge, designated by the presiding judge, may conduct a

pre-trial conference to be attended by every party’s trial counsel or lawyer with dispositive authority. At least eight (8) days notice thereof shall be given by the clerk to each party or lawyer of record; this provision amends and supplements present rule 5 (A).

8. The purposes and intent of this rule are (A) to aid and encourage the early disposition and settlement of appropriation claims and (B) to compel a full and complete disclosure so as to enable all parties to more adequately and intelligently prepare for a trial of the issues.

9. This rule shall apply to all claims filed on and after March 1, 1965.

We do not now urge the General Court to adopt “Rule 25A,” but we do recommend that the piecemeal proposal of H. 2496 (1965) be rejected. It will create more problems than it will solve.

**IV. “Fair Housing” Legislation**

**“BLOCK-BUSTING” — INCITING RACIAL TENSIONS**

**HOUSE . . . . . No. 758**

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AN ACT IMPOSING A PENALTY FOR INCITING RACIAL TENSION OR FEAR AMONG TENANTS OR OWNERS OF REAL ESTATE FOR THE PURPOSE OF INDUCING THE SALE THEREOF.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 272 of the General Laws is hereby amended by in-
- 2 serting after section 98C the following section:—
- 3 *Section 98D.* Whoever, directly or indirectly, incites or causes
- 4 another to incite or create racial tension or fear among owners,
- 5 their agents or tenants of real estate for the purpose of inducing
- 6 the sale thereof, on the representation, whether factual or not,
- 7 that the neighborhood where such real estate is situated is, or
- 8 will be inhabited by persons of certain racial, ethnic or religious
- 9 groups, origin or affiliation shall be punished by imprisonment
- 10 for not more than one year or by a fine of not more than one
- 11 thousand dollars, or both.

We do not deem this to be a wise proposal.

This is a criminal statute providing for a fine up to \$1,000. No criminal statute should be put on the books unless there is a clear and precise test which can be applied to the offender. No criminal statute should be enacted which is uncertain, vague, or difficult to construe and apply.

Massachusetts has enacted a comprehensive statutory scheme



which is aimed at the elimination of unlawful discrimination because of race, color, religious creed, national origin or ancestry.

This statutory scheme is found in the General Laws (Ter. Ed.) Chapter 151B. In 1963, Chapter 151B was amended by Chapter 613 of 1963. By this amendment, provisions were added to our law to eliminate discrimination in housing or housing accommodations.

We have made an investigation into the need and efficacy of the proposed statute. We fail to find that it has the support of those who are working in the interest of "fair housing." We believe that this statute is so vague that it cannot be said to properly state an offense.

Perhaps it is impossible to state with certainty the type of conduct which this proposed law seeks to eliminate.

Since we believe that progress is being made under Chapter 151B, and since we believe that not every uncharitable act can be reduced to the status of a crime, we cannot recommend this proposal.

We feel that Chapter 151B, as amended, is a more promising remedy than the proposed criminal statute.

**"ABSENTEE LANDLORDS"  
TO HAVE AN AGENT**

**HOUSE . . . 1965 . . . No. 2322**

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**AN ACT REQUIRING ABSENTEE LANDLORDS TO PROVIDE THE NAME OF A RESIDENT  
AS AGENT FOR SERVICE OF PROCESS.**

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1   SECTION 1. Any person owning a tenement within the defini-  
2   tion of section two of chapter one hundred and forty-four of the  
3   General Laws and including tenements within the city of Boston  
4   and including rooming houses, who does not reside therein, shall  
5   file in writing with the city or town clerk in the city or town  
6   where any such structure may be found the name and address  
7   of an individual residing in such city or town to be his true and  
8   lawful attorney upon whom all lawful processes in any action or  
9   proceeding against him may be served.
- 1   SECTION 2. If any person fails to comply with the require-  
2   ments of section one he shall be deemed to have appointed said  
3   city or town clerk as his agent as above, and service upon any  
4   such clerk shall have the same force and effect as service upon  
5   such person's duly constituted appointee.
- 1   SECTION 3. "Person," as used in sections one and two, shall

- 2 include but not be restricted to any individual, or individuals,
- 3 as tenants in common, joint tenants, tenants by the entirety or
- 4 otherwise; any corporation or business trust; any trustee; any
- 5 partnership; any receiver or trustee in bankruptcy; any tenant
- 6 having a leasehold interest for a period in excess of ten years;
- 7 any mortgagee in possession.

We presume that some of the impetus for legislation such as the above bill comes from the report of the Special Commission on Low-Income Housing created by Chapter 107 of the Resolves of 1964. In this report, which is House Document No. 4040 of 1965, at page 70, it is said:—

“Because of the widespread use of ‘straws’ in real estate transactions and the inadequacy of records pertaining to ownership of property, it is frequently difficult for enforcement agencies to serve violation notices and summonses. At one of the Commission’s public hearings, for example, it was reported that the Boston Building Department has approximately 400 summonses that it cannot serve because of inability to locate the owner. The need for a remedy in this area is perhaps indicated by the fact that no less than five so-called ‘true-name’ bills were filed at the 1965 session of the General Court. The Commission feels that remedial legislation is needed to insure that service of violation notices and summonses can be made promptly and properly. In this regard the Commission recommends a modified version of H. 2322 (1965), providing for the appointment by absentee owners of an individual residing in the city or town where a building is located as the lawful attorney for service of processes, and that if no such appointment is made, the city or town clerk will be deemed to have been so appointed. The Commission’s proposed bill also requires that if a posted violation exists, the owner will be required to register his true name and address.

“Twenty local health departments in the larger cities of the Commonwealth said they favored legislation to facilitate the service of violation notices and summonses, and only six departments said they did not think such legislation was necessary.”

There is now in effect in Boston, a special law which seems even more exacting than the one proposed above. This special act (Chapter 355 of the Acts of 1960, approved May 2, 1960, accepted by the City Council on August 15, 1960 and by the Mayor on August 16, 1960) reads as follows:—

SECTION 1. On and after July first in the current year, whoever owns land in the city of Boston upon which there is a building used in whole or in part for dwelling purposes, unless he has an usual place of abode or of business on such land, shall keep on file with the building commissioner of said city, and open to public inspection, a certificate reciting (1) his name, residence and place of business, with the street and number, if any, or in the case of a corporation, the corporate name and place of business and the names and residences of the president, treasurer and clerk thereof, and (2) a description, by street and number or otherwise, of the location of the land owned. Within

five days after any recital in such certificate changes, whoever then owns such land shall file a new certificate. A mortgagee shall not be deemed to own land within the meaning of this act until he takes possession or forecloses. Whoever violates any provision of this act shall be punished by a fine not exceeding one hundred dollars.

SECTION 2. This act shall take effect upon its acceptance by the city council of the city of Boston, subject to the provisions of the charter.

The final report of the Special Commission on Low-Income Housing contains the latest pertinent information relative to the need for housing legislation and for "additional legal tools." We cannot avoid the conclusion that it is certain that the most obvious area in any Massachusetts city where poor housing conditions exist is the Roxbury section of Boston. For at least five years, the requirements of Chapter 355 of 1960 have been in effect in this Roxbury area. The requirements of that law would seem to serve the purpose for which the proposed statute was intended. We are not in a position to investigate in order to discover the extent of compliance with the special act applicable to Boston, but we think that the existing law is more appropriate.

Some specific objections to the proposed statute (H. 2322) are these:—

(SECTION 1) There is no particular reason why the agent must reside in the same city or town in which the tenement is located. Many property owners do not reside in the same community in which their property is located. Such a provision would penalize some property owners and cause them additional expense.

(SECTION 2) In case of failure to appoint an agent, the city clerk would be deemed to be the agent. There is, however, no requirement that the city clerk take any action to give notice to the owner.

Presumably the owner could expect no notice from anyone. Dire results including seizure and demolition of the property without notice could follow, and this could happen to a property even if the owner was well known and easily identified from the assessors records or otherwise. We think this is too drastic. In the present Boston statute, there is a penal provision which calls for a fine of \$100 for failure to register.

(SECTION 3) We are sympathetic to the philosophy which is behind this proposed legislation, but we think that Section 3 may be so broad and so final as to property rights as to deprive certain persons of their property without

due process. Further than this, we can envisualize situations where certain "persons" could be involuntarily deprived of their rights before they had time to act.

We think that the purpose of this type of legislation is good, but the achievement of that purpose may not require such a drastic remedy. The report of the Special Commission reveals that the Boston Building Department cannot serve some 400 summonses because the owner cannot be found. Twenty health departments in larger cities favor this proposed legislation presumably for the same reasons. We recommend that concerted attempts be made to enforce laws such as Chapter 355 of 1960. Other towns and cities have remedies under the General Laws such as Chapters 139, 143, and 144.

We do not believe that it has been yet demonstrated that the municipality, acting through its investigative officers, and after a careful search, cannot ascertain the true identity of the majority of property owners. A certain small percentage of owners will defy any statute.

We believe that the problem is a budgetary one, and that there is perhaps inadequate staff and funds for the investigating agencies. We, therefore, can only recommend that more man hours and funds be made available for this type of investigation. We are not prepared to recommend the proposed act H. 2322.

## **V. Probate Courts and Proceedings**

### **PROBATION OFFICERS IN PROBATE COURTS**

This matter was placed on the agenda for the meeting of the Probate Judges of the Commonwealth, which was held in November, 1964.

At that meeting, after a full discussion by all the judges present, the overwhelming majority of the judges favored a probation department in our Probate Court.

This Senate bill (S. 329) provides for the establishment of a probation office in the Probate Courts of the Commonwealth. It provides for one probation office in each County. We recommend certain exceptions in the case of Barnstable, Dukes, Nantucket, Franklin and Hampshire Counties. With reference to those five counties, a probation officer at Barnstable would act as a probation officer for Barnstable, Dukes and Nantucket, and there would be one probation officer for Hampshire and Franklin counties.

The chief and immediate purpose of this bill is to provide the personnel and service to see that the decrees of the Probate Court



relating to the care, custody and support of dependent minor children are carried out. Such decrees are issued generally in three different types of proceedings:

- 1) Divorce libels
- 2) Petitions for separate support
- 3) Petitions for custody of dependent minor children whose parents are separated.

The only process presently available to a wife in cases where the husband fails to obey the court order of support for the children is to file a petition against him alleging him to be in contempt of court. This process involves retaining legal counsel, filing the petition in court, having a citation served on the husband, and appearing in court on the return day with counsel prepared to present evidence of the husband's failure to obey the court order of support for the children. The parties involved in this type of litigation are nearly always of limited financial means and ill-prepared to pay the expenses involved in this type of proceeding.

The Probate Court presently has no facility or personnel to keep it informed as to whether or not these orders are being carried out.

Under the provisions of this bill, the probation officer on complaint of the wife, could summon the husband to appear before him and insist on his complying with the order. If the husband still fails to pay the support order, the probation officer would have the authority to summon the husband before the court for appropriate action.

In order to acquaint the General Court with the number of decrees that relate to the care and support of minor children during the course of a year, we refer to the Statistics for 1964 of the Probate Courts in six different counties.

1964

Middlesex County	Divorce decrees .....	1,563
	Separate Support decrees .....	1,275
	Custody decrees .....	54
Worcester County	Divorce decrees .....	972
	Separate Support decrees .....	586
	Custody decrees .....	84
Essex County	Divorce decrees .....	682
	Separate Support decrees .....	77
	Custody decrees .....	33
Suffolk County	Divorce decrees .....	1,208
	Separate Support decrees .....	517
	Custody decrees .....	127

Hampden County	Divorce decrees .....	750
	Separate Support decrees .....	45
	Custody decrees .....	15
Norfolk County	Divorce decrees .....	852
	Separate Support decrees .....	77
	Custody decrees .....	12

In the above cases, decrees were entered on 2,172 contempt petitions that were filed during the said year 1964:

Middlesex County	Divorce Contempt decrees .....	98
	Separate Support Contempt decrees .....	712
Worcester County	Divorce Contempt decrees .....	188
	Separate Support Contempt decrees .....	104
Essex County	Divorce Contempt decrees .....	14
	Separate Support Contempt decrees .....	32
Suffolk County	Divorce Contempt decrees .....	682
	Separate Support Contempt decrees .....	161
Hampden County	Divorce Contempt decrees .....	51
	Separate Support Contempt decrees .....	2
Norfolk County	Divorce Contempt decrees .....	94
	Separate Support Contempt decrees .....	36

In the great majority of cases, the custody of minor children is involved. When the probate court order is disobeyed, the burden for support is cast upon the public.

Chief Justice Kenneth L. Nash of the District Courts of Massachusetts advises us that it would be an impossible burden for the District Courts to assume enforcement of probate decrees with existing manpower and facilities.

Aside from the manpower problem, it is undoubtedly more appropriate to provide the Probate Court with personnel to enforce the decrees of that court. The District Courts are now overburdened in their probation departments with collections made under Chapter 273A (Uniform Reciprocal Enforcement of Support Act). In the year ending June 30, 1964, a total of \$2,149,338 was collected through the District Courts under this act. The purpose of chapter 273A is to compel payment by a person who is under a duty to support persons in another state.

For a time the District Courts in Bristol County attempted to enforce probate orders, but this procedure has been severely limited due to inadequate manpower. In 1962, the collections (under probate orders) in Fall River, New Bedford and Taunton were

\$790,362. For the same cities during the year ending June, 1965, this total was \$244,688.

Further statistics on this subject were obtained from C. Eliot Sands, Commissioner of Probation who advises us:

"I am strongly of the opinion that the amount necessary to maintain the projected force of probation officers in the Probate Courts would be far less than the amount of the savings to the public on welfare and other public assistance. The total amount of money collected through the probation offices during 1964 on account of non-support (all categories) was \$10,661,909.99. I know that a large proportion of these non-support payments would never have been made had it not been for the fact that there were persons with authority whose responsibility it was to see that payments came in. I am also convinced that the total of such payments would have been greater had the probation officers not been heavily overburdened with other responsibilities as well as this one."

It is staggering to discover that the total amount of support money collected in one year exceeds ten million dollars, and if one could call these collections a "business," it is a big "business."

We have also in mind that if support orders can be enforced without resorting to criminal statutes, it would be preferable for all concerned. A probation officer is not a policeman; he wears no uniform, and his only objective is to restore his charges to responsibility.

If a father refuses to pay support as ordered, the only recourse for the mother of small means is to have him arrested. This is hardly an ideal situation for anyone, and it is not the most suitable method of persuasion. We would not suggest that it be abandoned, rather that it be used only when necessary. We cannot say that the present method of enforcing probate orders is a suitable alternative. A Probate Court probation officer would, we think, fill the gap.

We are conscious of the tax dollar, but if we can enforce probate orders, we will lessen the demand for public assistance.

We recommend the following:

## 1966 DRAFT ACT

---

AN ACT TO PROVIDE FOR PROBATION OFFICERS IN THE PROBATE COURTS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. The first paragraph of section 83 of chapter  
2 276 of the general laws, as most recently amended by section  
3 13 of chapter 731 of the acts of 1956, is hereby further  
4 amended by inserting after the words "superior court" in line  
5 1, the words:—the justices of the probate court for each  
6 county except Barnstable, Dukes, Nantucket, Hampshire  
7 and Franklin; and the justice of the probate court for  
8 Barnstable County who shall appoint only one probation  
9 officer for the Probate Court of the Counties of Barnstable,  
10 Dukes, and Nantucket; and the justice of the probate court  
11 for Hampshire County who shall appoint only one probation  
12 officer for the Probate Court of the Counties of Hampshire  
13 and Franklin.

1 SECTION 2. The second paragraph of said section 83 of  
2 chapter 276 of the general laws, as most recently amended by  
3 section 13A of chapter 731 of the acts of 1956, is hereby fur-  
4 ther amended by striking out the first two sentences and in-  
5 serting in place thereof the following two sentences:—The  
6 compensation of probation officers in all of the courts of the  
7 commonwealth shall be fixed according to schedules estab-  
8 lished from time to time by the committee on probation,  
9 who shall direct the commissioner of probation to consult  
10 the probation committee of the superior court, the admin-  
11 istrative committee of the probate justices, the justices of  
12 the municipal court of the city of Boston, the administra-  
13 tive committee of the district courts, and the county com-  
14 missioners in the several counties relative thereto. The com-  
15 pensation of each probation officer appointed by the super-  
16 ior court and by the justices of the probate court shall be  
17 paid by the commonwealth.

1 SECTION 3. Said chapter 276 of the general laws is hereby  
2 further amended by inserting after Section 85 the following  
3 two provisions:

4 Section 85A. In addition to other duties imposed upon him  
5 by the justices of the probate court, a probation officer of  
6 the probate court may, when ordered to do so by the court,  
7 examine all records and files in divorce, legal separation,  
8 annulment, custody and paternity cases in which orders  
9 or decrees have been entered to ascertain whether the per-



10 sons to whom payments of money should have been made  
11 regularly received the various and definite amounts pro-  
12 vided for in the orders or decrees of the court and, where  
13 there are dependent minor children, that the same are ap-  
14 plied for the support, maintenance, education and better-  
15 ment of said dependent minor children, and that said de-  
16 pendent minor children are properly cared for by their cus-  
17 todian; to bring into court when necessary, by citation or  
18 otherwise, all persons who are delinquent in making pay-  
19 ments ordered or decreed by the court; to ascertain in the  
20 case of dependent minor children whether they are receiv-  
21 ing proper maintenance and education and whether they are  
22 liable to become a public charge.

23 Section 85B. Said probation officer shall have full power by  
24 citation or other order duly issued by the probate court to  
25 compel the attendance of witnesses to take testimony and  
26 do each and every thing necessary, including instigating  
27 contempt proceedings, to collect any and all delinquent pay-  
28 ments due to any person entitled under order or decree of  
29 said court to receive payments; to make recommendations  
30 to the probate court, where there are dependent minor chil-  
31 dren, for the betterment of the conditions of said dependent  
32 minor children; and to ascertain when requested to do so by  
33 the court the moral and general conditions surrounding said  
34 dependent minor children and shall report the result of such  
35 findings to said court.

1 SECTION 4. The first paragraph of section 89 of said chap-  
2 ter 276 of the general laws, as most recently amended by sec-  
3 tion 17 of chapter 731 of the acts of 1956, is hereby further  
4 amended by inserting after the words "superior court" in line  
5 1, the words:—the senior justice of a probate court for any  
6 county, except Dukes, Nantucket and Franklin.

1 SECTION 5. The first sentence of section 94 of said chapter  
2 276 of the general laws, as most recently amended by section  
3 2 of chapter 296 of the laws of 1939, is hereby further amended  
4 by inserting after the words "superior court" in line 2, the  
5 words:—and the probate court, as provided in Section  
6 one of this Act.

NOTE: The words "judge" or "judges" should be employed in the  
above draft act wherever the word "justice" or "justices"  
appear.

# REVOCATION OF A WILL BY MARRIAGE

# HOUSE . . . . 1965 . . . . No. 370

AN ACT PROVIDING THAT A WILL SHALL NOT BE REVOKED BY A MARRIAGE IN WHICH THE SPOUSE OF THE TESTATOR PREDECEASES HIM LEAVING NO ISSUE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Section 9 of chapter 191 of the General Laws, as appearing in  
2 the Tercentenary Edition, is hereby amended by striking out the  
3 first sentence and inserting in place thereof the following sen-  
4 tence:—The marriage of a person shall act as a revocation of a  
5 will made by him previous to such marriage unless it appears  
6 from the will that it was made in contemplation thereof, or the  
7 spouse of such marriage predeceases the testator leaving no issue.

We do not recommend this bill. At present, it is provided in General Laws (Ter. Ed.) Chapter 191, § 9:

*“Effect of Marriage.* The marriage of a person shall act as a revocation of a will made by him previous to such marriage, unless it appears from the will that it was made in contemplation thereof.”

The proposed amendment to this section 9 would create considerable uncertainty in an area where uncertainty is the last thing to be desired.

The proponents of this legislation appear to believe that if a man made a will, subsequently married and then his wife subsequently died without issue, the premarital will should stand or be revived.

At present, such a will would be revoked when the marriage took place unless it was made in contemplation of the marriage. It would not be revived, and unless a new will was made, the property would descend according to the laws of descent and distribution.

The amendment seeks to revive the will if the wife had no issue. Of course, this doctrine is equally applicable to both spouses.

It would be undesirable to have the status of a will depend on a principle of law as inconclusive as the one suggested here.

In short, we cannot recommend a situation where a will would be left in “cold storage” and possibly revived if there was no issue.

NOTE: It has been held that a will revoked by marriage is not revived by a subsequent divorce (See *Levine v. Ramler*, 325 Mass. 141.)

DIVORCE AS REVOCATION OF A WILL

HOUSE . . . . 1965 . . . . No. 2152

AN ACT PROVIDING THAT A DIVORCE SHALL ACT AS REVOCATION OF A WILL PREVIOUSLY MADE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Section 9 of chapter 191 of the General Laws, as appearing in  
2 the Tercentenary Edition, is hereby amended by adding at the  
3 end the following sentence:—The divorce of a person shall act  
4 as a revocation of a will made by him previous to such marriage,  
5 unless it appears from the will that it was made in contemplation  
6 thereof.

We do not recommend this bill. Chapter 191, § 8 of the General Laws specifies the methods of revoking a will. One of the methods of revocation is “by subsequent changes in the condition or circumstances of the testator from which a revocation is implied in law.”

As indicated elsewhere, marriage of a person under Chapter 191, § 9 is a change in the condition or circumstances which supports revocation. The birth of a child, after making a will, is also a change in circumstances which supports a revocation.

In *Hertrais v. Moore*, 325 Mass. 57, there is a discussion of the history and origin of the legal doctrine of implied revocation and a discussion of the background of § 8 and § 9 of Chapter 191.

It was held in the *Hertrais* case that a divorce could not be deemed an implied revocation. The theory is that divorce is not such a change in circumstances as to imply a revocation on the part of the testator. If the testator wishes to revoke his will after a divorce, revocation may be accomplished by any of the acts set forth in § 8, Chapter 191 (i.e., burning, destruction, making a new will, etc.)

The proposed legislation provides an automatic revocation, presumably effective with the final decree of divorce.

We have in mind that many wills contain complicated provisions for children, relatives, charities, or other objects of the testator’s bounty. Many wills contain complicated trusts and other carefully prepared estate plans.

We do not believe that it is necessary or useful to provide an automatic revocation in case of divorce.

## DRAFT ACTS RECOMMENDED TO THE 1966 GENERAL COURT

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## APPENDIX A — 1965 REPORT

### Rule 15.

(Effective April 1, 1966)

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### DEPOSITIONS AND DISCOVERY.

#### Section 1. Depositions Pending Action.

(a) When depositions may be taken. Any party to an original civil proceeding pending in the supreme judicial court, or to a civil proceeding pending in the superior court, land court, or the probate courts, may take the testimony of any person, including a party, by deposition upon oral examination for the purpose of discovery or for use as evidence or for both purposes. After service of process the deposition may be taken without leave of court except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff prior to the time allowed the defendant for appearance; or where in an action at law there is no reasonable likelihood that recovery will exceed five thousand dollars if the plaintiff prevails; or in a creditor's bill in equity the claim does not exceed five thousand dollars; or in an action at law there has been a trial in a district court before transfer; or in an action at law there has been a hearing before an auditor; or in proceedings for the custody of minor children, or in libels for divorce or for affirming or annulling marriage, or for separate support, or in any like proceeding. The attendance of witnesses may be compelled by the use of summons or subpoena as provided by Section 4 (a). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Section 4 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The party taking the deposition shall not require the production or submission for inspection of any writing,

plan, recording, model, photograph, or other thing prepared by or for the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the court otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Section 7 (b) the conclusions of an expert. The deponent may not be examined on or be required to produce for inspection any liability insurance policy or indemnity agreement unless such policy or agreement would be admissible in evidence at the trial of the action.

(c) Examination and Cross Examination. Examination and cross-examination of deponents may proceed as permitted at trial in the court where the proceeding is pending.

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony or deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; or (ii) that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is

relevant to the part introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any court of the United States or of any state has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

(e) Objections to Admissibility. Subject to the provisions of sections 2 (b) and 5 (c), objections may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subsection (d) of this section. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

## Section 2. Persons Before Whom Depositions May Be Taken.

(a) Within the Commonwealth. Within the Commonwealth depositions shall be taken before an officer authorized to administer oaths by the laws of the Commonwealth or the United States, or before a person appointed by the Court, in which the proceeding is pending. A person so appointed has the power to administer oaths and take testimony.

(b) Outside the Commonwealth. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, whether by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter roga-



tory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the state, territory, or country]." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee or partner or associate of such attorney or counsel, or is financially interested in the proceeding.

### Section 3. Stipulations Regarding the Taking of Depositions.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like any other depositions.

### Section 4. Procedures for Depositions Upon Oral Examination.

(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination, at least seven days before the time of the taking of the deposition, shall give notice in writing to every other party to the proceeding and file a copy of the notice in court in the proceeding. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party to the proceeding, the court may for cause shown enlarge or shorten the time. A resident of the commonwealth shall not be required by subpoena to travel a distance of more than fifty miles from his place of residence or from his place of business or employment, unless the court otherwise orders. A non-resident of the commonwealth may be required by subpoena to attend only within fifty miles from the place within the commonwealth wherein he is served with a subpoena, or at such other convenient place as is fixed by an order of court. The court may regulate at its discretion the time, place and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interest of justice.

(b) Orders for the Protection of Parties and Deponents. After



notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the proceeding is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the proceeding and their officers or counsel, or that the deposition be sealed and opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression. The court may in its discretion where notice is given of the taking of depositions outside the state and at great distances from the place where the case is to be tried, require the party taking the deposition to pay the traveling expenses of the opposite party and of his attorney where their attendance is reasonably necessary at the taking of said deposition; and where it appears that the witness whose deposition is sought is under the control of the party taking the deposition, the court may require such witnesses to be brought within the state and his deposition taken there. The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

(c) Record of Examination; Oath; Objections. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. The cost thereof shall be borne by the party taking the deposition, except that the court may for cause shown order the cost of stenographer or transcription equitably apportioned among the parties. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may transmit

written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, oppress the deponent or party, any justice of the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under section 5 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the proceeding and marked "Deposition of [here insert name of witness]" and shall promptly deliver or mail it to the clerk of the court in which the proceeding is pending. The parties by stipulation may waive transcription and filing of the deposition.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(4) Upon being filed, the deposition shall be open to inspection unless otherwise ordered by the court.

(g) Failure to Attend or to Serve Summons or Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a summons or subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(h) Engagements of Counsel. The engagement of counsel at the taking of a deposition shall be recognized to the extent that the court in which the proceeding is pending shall order upon application in writing to the court not less than three days prior to the time for the taking of a deposition.

#### Section 5. Effect of Errors and Irregularities in Depositions.

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.



(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under section 4 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

#### Section 6. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of section 4 (b), the court may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by section 1 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, testing, or photographing the property or any designated object or operation thereon within the scope of examination permitted by section 1 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

#### Section 7. Physical and Mental Examination of Persons.

(a) Order for Examination. In a proceeding in which the mental or physical condition of a party is in controversy, or may affect the conduct of the proceedings, the court in which the proceeding is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

#### (b) Report of Findings.



(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that proceeding or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

#### Section 8. Refusal to Make Discovery; Consequences.

(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court for an order compelling an answer. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

#### (b) Failure to Comply with Order.

(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court, the refusal may be considered a contempt of court.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this section requiring him to answer designated questions,

or an order made under section 6 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order under section 7 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Failure of a Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the proceedings or any part thereof, or enter a judgment by default against that party.

(d) Expenses Against the Commonwealth. Expenses and attorney's fees are not to be imposed upon the Commonwealth under this section.

#### Section 9. Costs on Depositions.

The taxing of costs in the taking of depositions shall be subject to the discretion of the Court. No costs shall be allowed unless the Court finds that the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at trial. Taxable costs may include the costs of service of summons or subpoena upon the deponent, the reasonable fee of the officer before whom the deposition is taken, the stenographer's reasonable fee for attendance, and the costs of transcription or such part thereof as the Court may fix.









# **FORTY-SECOND REPORT**

## **Judicial Council of Massachusetts**

### **— 1 9 6 6 —**

#### **I. CIVIL PRACTICE AND PROCEDURE**

**Declaratory Judgment Procedure**  
**Ex Parte Injunctions In Probate Court**

#### **II. CRIMINAL LAW AND PROCEDURE**

**Should There Be District Court Hearings Prior To**  
**Indictment?**  
**Criminal Proceedings Against Children — Motor**  
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#### **III. PROCEDURAL IMPROVEMENTS — DISTRICT COURTS**

**Summary Judgments In District Court**

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**Stenographic Transcripts of Administrative Pro-**  
**ceedings As Evidence**

#### **V. TORTS**

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#### **VI. IMPROVEMENTS IN JUDICIAL ADMINISTRATION**

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# FORTY-SECOND REPORT

## Judicial Council of Massachusetts

### — 1966 —

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## The Commonwealth of Massachusetts

### JUDICIAL COUNCIL

DECEMBER, 1966

TO HIS EXCELLENCY, JOHN A. VOLPE,  
*Governor of Massachusetts*

In accordance with the provisions of  
Section 34B of chapter 221 of the General  
Laws (Ter. Ed.), we have the honor to  
transmit the forty second annual report of the  
Judicial Council for the year 1966.

FREDERIC J. MULDOON, *Chairman*

REUBEN L. LURIE

JOHN A. COSTELLO

ELWOOD HETTRICK

ELIJAH ADLOW

CHARLES W. BARTLETT

LIVINGSTON HALL

RAYMOND F. BARRETT

ARTHUR A. THOMSON

## JUDICIAL COUNCIL

### G. L. (Ter. Ed.) Ch. 221 §§34A - 34C

The Judicial Council Was Established To Make A Continuous Study of The Organization, Procedure and Practice Of The Courts.

#### Statutory Authority

*Section 34A.* There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods not exceeding four years, as he shall determine.

*Section 34B.* The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

*Section 34C.* No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof shall receive from the commonwealth a salary of five thousand dollars.

## MEMBERS OF THE JUDICIAL COUNCIL

(DECEMBER, 1966)

FREDERIC J. MULDOON of Westwood, *Chairman*

REUBEN L. LURIE of Brookline	LIVINGSTON HALL of Concord
JOHN A. COSTELLO of Andover	RAYMOND F. BARRETT of Milton
ELWOOD HETTRICK of Wellesley	ARTHUR A. THOMSON of North Andover
ELIJAH ADLOW of Boston	CHARLES W. BARTLETT of Dedham

JAMES B. MULDOON of Weston, *Secretary*

One Court Street, Boston, Massachusetts 02108

Telephone 742-3711

## CHANGES IN MEMBERSHIP OF THE COUNCIL IN 1966

The Judicial Council is pleased to announce the appointment of Elwood Hettrick of Wellesley, former Dean of Boston University Law School now Judge of the Land Court. Judge Hettrick succeeded Judge John E. Fenton upon his retirement in October of 1965.

## INQUIRIES CONCERNING THIS REPORT

This report is distributed by the Public Document Room at the State House in Boston. Copies are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others. As long as the supply lasts, copies of this report, and also copies of some earlier reports, can be obtained, without charge, by requesting them from the Public Document Room, State House, Boston, Massachusetts.

Correspondence may be sent to James B. Muldoon, Secretary, Judicial Council of Massachusetts, One Court Street, Boston, Mass. 02108.

## BRIEF HISTORY OF THE JUDICIAL COUNCIL AS AN ADVISORY BODY AND ITS RELATION TO THE COURTS, THE BAR AND THE ADMINISTRATION OF JUSTICE

Since the purpose and history of the Council may not be familiar to more recent members of the legislature, public officials and members of the legal profession, a brief outline may be of assistance.

The Council was created as an advisory body on the recommendation of the Judicature Commission of 1919-20, which said:-

"The legislative committees on the judiciary and on legal affairs are in constant session every year hearing petitions for legislation of every variety relative to the courts, submitted mainly by individuals. Some of these suggestions have been carefully prepared and thought out, while many of them have not. These committees render good service to the Commonwealth in dealing with such proposals. Both of these committees, however, are overburdened with the many petitions for legislation presented to them every year, in addition to the work of the individual members in other connections.

"It is not a good business arrangement for the Commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The interest of the people, for whose benefit the courts exist, calls for some central clearing house of information and ideas which will focus attention upon the existing system and encourage suggestions for its improvement."

Shortly after the creation of the Massachusetts Judicial Council in 1925, the General Court gave another assignment to the Council:

#### 1925 RESOLVES, CHAPTER 27

"Resolved, That the judicial council is hereby requested to investigate ways and means of expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and among other things . . . measures for discouraging frivolous appeals; measures for requiring parties to frame issues in advance of trial by greater specification in the declaration of what the plaintiff in good faith claims and greater specification in the answer of what the defendant admits or in good faith denies, with suitable penalties for frivolous or unfounded allegations and denials; ways and means for encouraging, so far as consistent with constitutional rights trials without jury . . . and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925.)"

The Judicial Council has urged countless "reforms" in order to improve and modernize court procedure. But there is another necessity which must also be borne in mind. It should be the aim of our judicial system to strive for excellence in the disposition of those cases which are tried, and in the application of the law to the facts which are presented. We cannot escape the fact that the eyes of the many are constantly focused on those cases which come to trial. Statistics gathered over the years indicate that only a small percentage of disputed claims are ever tried out before the courts. We are thus concerned with not only the quantity of cases which are filed but with the quality of judicial administration in those cases which



are tried, and which, in the last analysis, set the pattern for the disposition and settlement of the many cases which will not and cannot be tried.

Justice is an ideal for which we strive. To do justice requires a constant effort on the part of the bench and the bar, and to improve the procedures which are designed to achieve the ideal, the General Court and the Judiciary shall continue to cooperate. It is in this atmosphere that the Judicial Council stands ready to act.

Since 1925 the legislature has constantly passed resolves requesting reports on the specified matter of pending bills on which the General Court wishes advisory assistance. With the exception of those matters so broad in scope that the Council is not equipped to act, these requests of the General Court have been answered with the advice and judgment of the members of the Council.

For the convenience of the legislature and the courts and practising lawyers we call attention to the fact that annexed to the 27th report in 1951 was an index to the contents of these reports since 1919, with an introductory statement and an annotated list of statutes passed after recommendation of the Judicature Commission and of the Judicial Council, *with references to the reports where the reasons for each statute may be found*. This list of statutes brought down to 1954, was reprinted for reference in the Massachusetts Law Quarterly for February 1955, Vol. 40, No. 1. An index to all the reports of the council will be made in the future.

The various annual reports also contain the reasons for negative recommendations on bills referred to the Council of which there are many.

## JUDICIAL COUNCIL

### 1966 HOUSE AND SENATE BILLS REFERRED TO THE JUDICIAL COUNCIL

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# I. CIVIL PRACTICE AND PROCEDURE

## Declaratory Judgment Procedure

HOUSE . . . 1966 . . . No. 1243

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### AN ACT AMENDING PROCEDURE FOR DECLARATORY JUDGMENTS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 231A of the General Laws is hereby amended by  
2 adding after section 3 thereof the following new section:—

3 *Section 3A.* The court may sustain a demurrer to any bill for  
4 declaratory relief wherein the plaintiff seeks a declaration of law  
5 or any other declaration to which the plaintiff is not entitled upon  
6 the face of the bill.

In 1945 the supreme judicial court, the superior court, the land court, and the probate court were authorized for the first time by Chapter 231A to make binding declarations of right, duty, status, and other legal relations as to which there was a controversy existing which could be settled by a judgment declaring the correct legal situation in regard to such controversy. The procedure has been extremely useful to the citizens of this Commonwealth and has been widely applied to almost every type of legal problem. It is a procedure which is particularly well adapted for a judicial pronouncement of binding declarations of the rights of parties which arise under deeds, wills, contracts, by-laws, statutes enacted by the General Court, and other writings both public and private.

By introducing into our law the concept of the declaratory judgment, the General Court provided as follows:—

“This chapter is declared to be remedial. Its purpose is to remove and to afford relief from uncertainty and insecurity with respect to rights, duties, status and other legal relations, and it is to be liberally construed and administered . . .” G.L. (Ter. Ed.) Chapter 231A §9

We desire to point out that while we have had proceedings in Equity in this commonwealth almost from its beginnings, we have provided this new declaratory judgment procedure only since World War II. It thus should be understood that we should not necessarily apply legal philosophy to the newer declaratory judgment procedure which is more applicable to traditional actions at law or suits in

Equity. The declaratory judgment procedure was intended among other things to prevent litigation by having the court set forth in advance the probable consequences of an action contemplated by the parties, and as to which there was doubt on one side or the other.

The procedure can also be used and is in fact very often used to settle controversies which arise after action has been taken. It is particularly useful where one party is proceeding along a continuous course of action which is challenged by the other.

It is necessary in every case in which a declaratory judgment is sought that there actually be a controversy which can be brought before the court and settled by its judgment. The court may refuse to enter a declaratory judgment where such a declaration would not end the controversy "or for other sufficient reasons".

In *Cary Realty Corporation vs. City of Chelsea & others*, 345 Mass. 769, the supreme judicial court indicated that a bill seeking a declaratory judgment which was "studded with conclusions of law and lacking . . . that factual presentation necessary to substantiate the plaintiff's complaint" was properly dismissed from consideration by the trial court.

House 1243 of 1966 would provide in essence that if the person who files a petition seeking a declaratory judgment shows to the court, and to the adverse parties that he is not entitled to what he seeks as a matter of law, the petition should be dismissed when the defendant files a demurrer challenging the sufficiency of the petition.

In the ordinary case, if a petitioner in equity or a plaintiff in an action at law shows on the face of his pleadings that he is not entitled to the judgment he seeks as a matter of law, it is proper to uphold the challenge made by the other side, in a demurrer, and dismiss the petition or the writ unless it can be amended to state a good case.

The rules applicable to the ordinary case are not necessarily applicable to the declaratory judgment procedure. We can assume that parties will not undergo the expense of a law suit, counsel fees, court costs, and great inconvenience unless they wish a judge to rule on their dispute.

If a petition for a declaratory judgment is filed, it is presumed that the parties desire a ruling which will terminate the uncertainty and insecurity attending the situation. It may well be that the plead-



ings or even the petition itself will tend to demonstrate that the petitioner is not entitled to the decision. It is much more likely that there would be a difference of opinion as to the ultimate disposition. If it were made possible for the court to dismiss such a petition by sustaining the demurrer of the defendant, the uncertainty would not end, and the insecurity would not pass away. The parties would still be left without a judgment of a court upon which both could rely to settle past arguments and prevent future ones.

We therefore advise that the declaratory judgment procedure should not be so constricted. It was intended to be remedial, liberally applied, and as a departure from the traditional.

It has been pointed out to us that in the case of *Moskow v. Boston Redevelopment Authority*, 1966 A.S. 1203, the supreme judicial court made a comment that on the demurrers of some of the defendants "it would have been much better practice to overrule the demurrers and to make a negative declaration".

We think this statement is one which must be considered in the proper context. We think that the supreme judicial court indicates that if it is a close question as to whether or not a "justiciable controversy" exists between the parties, it would be better practice to have a trial of the factual issues rather than merely to sustain a demurrer and thereby allow the case to be appealed on a question which is "close", and one on which able minds could differ. This comment by the supreme judicial court does not support any contention that the declaratory judgment statute is unclear or that the trial courts face uncertainty.

Our conclusion is that a petitioner seeking a declaratory judgment is entitled to a decision. If it is against him, that may be the "negative" decision which he desires. To the end that all our judicial proceedings should seek to terminate controversies, we oppose the proposed amendment. We think this amendment would be a breeding ground for litigation.

## **Ex Parte Injunctions in Probate Court**

Under the present practice, it is not necessary in a proceeding in the Probate Court to notify the opposite party when a preliminary injunction is sought. In the Superior Court it is provided by General Laws, Chapter 214, Section 9 that: —

"No preliminary injunction shall be granted without notice to the opposite party. No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice . . ."

General Laws, Chapter 214, Section 9 is not applicable to the Probate Court.

Under the provisions of General Laws, Chapter 215, Section 6, equity jurisdiction was granted to the Probate Court in 1964.

A court of equity, whether it is the Superior Court or the Probate Court, has the power to issue temporary restraining orders and preliminary injunctions.

In Probate Court, however, many temporary restraining orders are issued in connection with proceedings for separate support and divorce. In many of these cases, it is generally impossible to give notice to the erring spouse. In some instances the party cannot be found, and in any event, the requirement of notice is not practical in the opinion of those who deal with this problem on a daily basis.

In other matters concerning the settlement of estates, summary orders which amount to injunctions, sometimes mandatory in nature, are issued. For these reasons, a requirement that the Probate Court must require notice to the other party in all cases before the issuance of a temporary restraining order, or a preliminary injunction, does not meet the practical necessities involved.

However, in the exercise of its "new" general equity jurisdiction, there is no legitimate reason why a judge of the Probate Court should grant preliminary injunctions without notice to the other side where a judge of the Supreme Court is forbidden to do so.

In both cases, Chapter 214, Section 9 as amended by the draft act suggested below, would still permit the court to deal with irreparable loss or damage on a verified Bill of Complaint without notice to the other side.

We recommend the following:—

## 1967 DRAFT ACT

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*Section 1.* Chapter 215, Section 6 of the General Laws, (Ter. Ed.) is hereby further amended by adding the following paragraph.

In all cases where the Probate Courts shall exercise the general equity jurisdiction conferred upon them by Chapter 820 of the Acts of 1963 no pre-

liminary injunction or temporary restraining order shall be granted except in accordance with the provisions of G.L. (Ter. Ed.) Chapter 214, Section 9.

*Section 2.* Chapter 214, Section 9 of the General Laws (Ter. Ed.) is hereby further amended by striking out the last sentence thereof and by substituting therefor the folowing sentence:

This section shall not apply to proceedings in the Probate Courts except where the Probate Courts shall exercise the general equity jurisdiction conferred upon them by Chapter 820 of the Acts of 1963 or to labor disputes as defined in section twenty C of Chapter 149 but shall apply to jurisdictional disputes in accordance with section nine B.

**SERVICE OF PROCESS ON FOREIGN  
INSURANCE COMPANIES**

**HOUSE . . . 1966 . . . No. 1428**

AN ACT FURTHER DEFINING PROCEDURE FOR SERVICE OF FOREIGN INSURANCE CORPORATIONS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Section 151 of Chapter 175 of the General Laws is hereby  
2 amended by inserting in the first sentence of the fourth para-  
3 graph thereof after the word "proceeding" and before the word  
4 "against," the words:—civil or criminal, so that said fourth  
5 paragraph shall read as follows:—Third, It has filed with the  
6 commissioner a power of attorney constituting and appointing  
7 the commissioner or his successor its true and lawful attorney,  
8 upon whom all lawful processes in any action or legal pro-  
9 ceeding, civil or criminal, against it may be served, and therein  
10 shall agree that any lawful process against it which may be  
11 served upon its said attorney shall be of the same force and  
12 validity as if served on the company, and that the authority  
13 thereof shall continue in force irrevocable so long as any lia-  
14 bility of the company remains outstanding in the commonwealth-  
15 wealth. The power of attorney shall be executed by the presi-  
16 dent and secretary of the company, or other officers duly  
17 authorized thereto, under its corporate seal, and shall be ac-  
18 companied by certified copy of the resolution of the board of  
19 directors of the company making said appointment and  
20 authorizing the execution of said power of attorney which shall  
21 be in a form prescribed by the commissioner. The service of  
22 such process shall be made by leaving the same in duplicate  
23 in the hands or office of the commissioner. One of the duplicates  
24 of such process certified by the commissioner as having been

25 served upon him, shall be deemed sufficient evidence thereof,  
26 and service upon such attorney shall be deemed service upon  
27 the principal.

## SERVICE OF PROCESS ON FOREIGN CORPORATIONS

HOUSE . . . 1966 . . . No. 1429

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### AN ACT FURTHER DEFINING PROCEDURE FOR SERVICE OF FOREIGN CORPORATIONS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Section 37 of Chapter 223 of the General Laws  
2 is hereby amended by striking said section and substituting  
3 therefor the following:—

4 *Section 37.* In any civil action against a county, city or town  
5 or in any action or criminal proceeding against a parish or  
6 religious society, or against the proprietors of wharves, general  
7 fields or real estate lying in common, who are incorporated,  
8 service shall be made upon the treasurer thereof, or if no  
9 treasurer is found, upon one of the county commissioners, the  
10 city clerk or one of the aldermen, the town clerk or one of  
11 the selectmen, upon one of the assessors or standing committee  
12 of the parish or religious society, or upon one of the proprietors  
13 of such land or other estate, as the case may be. If there are  
14 no such officers as are mentioned in this section, service shall  
15 be made upon one of the inhabitants of the county, city or town,  
16 or upon one of the members of the corporation.

17 In any civil action or criminal proceeding against a domestic  
18 corporation other than one mentioned in the preceding para-  
19 graph, service shall be made upon the president, treasurer,  
20 clerk, cashier, secretary, agent or other officer in charge of its  
21 business, or, if no such officer is found within the county, upon  
22 any member of the corporation. If an officer authorized to  
23 serve legal process makes a return on such process that, after  
24 diligent search, he can find no one upon whom he can lawfully  
25 make service as aforesaid, the court to which process is  
26 returned may upon application issue an order of notice to such  
27 corporation, directing it to appear and answer or enter a plea  
28 within a designated period. Such order of notice shall contain  
29 an exact copy of the legal process referred to in the preceding  
30 sentence. The party making such application shall deliver a  
31 copy of such order in duplicate with a fee of two dollars to the  
32 state secretary or a deputy, or in the office of said secretary.



33 Said secretary shall forthwith cause said copy to be forwarded  
34 by registered mail, return receipt requested, to such corpora-  
35 tion at such address as may be designated for the purpose by  
36 a writing signed by its president, treasurer or clerk and filed  
37 with said secretary or if no such address has been designated,  
38 to its principal place of business in the commonwealth as stated  
39 in the last certificate of condition filed by it or, if no certificate  
40 has been filed by it, as stated in its articles of organization or  
41 any articles of amendment thereof. As soon as may be after  
42 such mailing by said secretary, he shall transmit a certificate  
43 to the court issuing such order, stating that he has complied  
44 with the provisions of this section, and shall attach thereto the  
45 return receipt or the undelivered copy, as the case may be. The  
46 clerk shall note upon the docket the name of the corporation  
47 and the address to which such copy was mailed by the secretary  
48 and shall file with the papers in the case the certificate of the  
49 secretary and the return receipt or undelivered copy, as the  
50 case may be, and such service shall be a sufficient service upon  
51 such corporation. The court in which the action or criminal  
52 proceeding is pending may order such continuances as may be  
53 necessary to afford the corporation reasonable opportunity to  
54 defend the action.

1 SECTION 2. Section 38 of Chapter 223 of the General Laws  
2 is hereby amended by striking out the first three words thereof  
3 and substituting therefor the words: — In any civil action or  
4 criminal proceeding, so that said section 38 as amended shall  
5 read as follows: — *Section 38.* In any civil action or criminal  
6 proceeding against a foreign corporation, except an insurance  
7 company, which has a usual place of business in the common-  
8 wealth, or, with or without such usual place of business, is  
9 engaged in or soliciting business in the commonwealth, per-  
10 manently or temporarily, service may be made in accordance  
11 with the provisions of the preceding section relative to service  
12 on domestic corporations in general, instead of upon the com-  
13 missioner of corporations and taxation under section three  
14 or section three A of Chapter one hundred and eighty-one.

Under Chapter 175, Section 151 of the General Laws, no out-of-state insurance company may do business in Massachusetts unless it has appointed the Massachusetts commissioner of insurance as its true and lawful attorney for the service of civil process. The existing law does not concern itself with criminal process and it is not necessary for an out-of-state insurance company to agree that the Massachusetts commissioner is its agent for the service of a subpoena to appear before the grand jury or before our courts in a criminal trial or proceeding. A foreign insurance company may be indicted by a

Massachusetts grand jury, but it does not always follow that it can be brought to trial on such an indictment.

What is true of the out-of-state insurance company is true of the corporation organized under the law of another state or country. Under Chapter 223, Section 38 of the General Laws, it is now possible to make service on a foreign corporation (other than an insurance company) if it has a place of business in this commonwealth or is soliciting business here.

If the out-of-state corporation does not register in Massachusetts, it is possible to make service on the Secretary of State under Section 3 or 3A of Chapter 181 of the General Laws. As in the case of the insurance companies, this type of service of process does not presently apply to criminal process.

*It might also be observed that mere service of civil process on the Secretary of State under existing law does not inevitably mean that jurisdiction has been conferred on the courts of this commonwealth.*

The proposal of House 1429 of 1966 is to allow criminal process to be served on the Secretary of State of this commonwealth in the event that no officer or other proper agent of a domestic or foreign corporation can be located.

Under present statutes a foreign corporation or insurance company is able to avoid unpleasant complications by merely staying in its own backyard doing nothing. An individual person who has committed a crime in this commonwealth is not so fortunate. Under G. L. (Ter. Ed.) Chapter 276, §11 et seq the Governor has discretionary power to "cause to be arrested and delivered up to the executive authority of any other state any person charged in such other state with treason, felony, or other crimes . . . or with being a fugitive from justice or violation of probation or bail".

Extradition is provided for in the United States Constitution and other states have statutory or constitutional procedures for returning to this commonwealth such persons as may be found elsewhere who are wanted for trial here.

Under Chapter 90, Section 3A et seq the registrar of motor vehicles may be served with *civil* process in cases arising out of the operation of a motor vehicle in this state by a non-resident. Again there is no

provision for substituted services of criminal process on the registrar of motor vehicles.

We would have little concern for a statute which provided for extension of the jurisdictional long arm of the *civil* courts of this commonwealth. We urged such legislation last year, and we urge it again elsewhere in this project.

In these bills there is provision which applies to Massachusetts Corporations as well as those coming from beyond the borders. This provision permits criminal process to be served on certain minor officers or even "members" of a corporation.

We believe that a proposal of this sort should receive further study and are not now ready to make any recommendation in connection with it.

We will therefore reserve our opinion on the matter until next year. We trust that it will be kept in mind that in the event of a default and failure to appear in court to answer a criminal complaint, the proposed statutes, standing alone, may not be determinative of the question of jurisdiction.

### **Interstate and International (Civil) Procedure Act**

In our 41st Report (pps. 8-20) we observe that the "Long-Arm" of the Massachusetts courts had not been extended to permissive limitations so that jurisdiction was limited over nonresidents.

We stated that it was necessary for the General Court to enact legislation in this area. In our 41st Report we said:

"There is no question but that the Uniform Acts extends the jurisdictional "long arm" of the state to a point at the outer limits defined by the United States Supreme Court in *International Shoe Co. v. State of Washington*. We do not think that these limits of minimal contacts and fair play are exceeded, and we feel that our Supreme Judicial Court will quickly set such constitutional boundary posts as may be required.

Upon the passage of this legislation, foreign corporation and individuals who derive economic and other benefits from our commonwealth will henceforth be subject to the jurisdiction of its foreign fields at considerable expense to themselves. In one sense at last, Massachusetts is a major marketing area of five million people and a major industrial society. We believe that only the most insubstantial foreign corporation will be deterred from participating in our economic life because of this new law. In the major commercial centers of New York and Chicago, our corporations are already subject to jurisdictional obligations of this type."

Elsewhere in this report we have commented upon the expansion of criminal jurisdiction by including nonresident corporations and foreign insurance companies.

Whether or not the need is great for such expansion of criminal jurisdiction, we cannot yet make conclusions. We do know that there is a great need to broaden the scope of our "Long-Arm" statute for the protection of the citizens of the Commonwealth. For every criminal case which might require legislation in this area, there must be hundreds of civil cases in which wrong is alleged by a citizen of this Commonwealth. For this reason, we again urge the enactment of the "Uniform Interstate and International Procedure Act".

## 1967 DRAFT ACT

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### AN ACT ESTABLISHING THE UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. The General Laws as hereby amended by insert-  
2 ing after Chapter 223 thereof the following new chapter:—

3 CHAPTER 223A.

4 UNIFORM INTERSTATE AND INTERNATIONAL  
5 PROCEDURE ACT

6 ARTICLE I. BASES OF PERSONAL JURISDICTION OVER PERSONS  
7 OUTSIDE THIS STATE.

8 *Section 1.* As used in this Article, "Person" includes an  
9 individual, his executor, administrator or other personal repre-  
10 sentative, or a corporation, partnership, association or any other  
11 legal or commercial entity, whether or not a citizen or domi-  
12 ciliary of this state and whether or not organized under the  
13 laws of this state.

14 *Section 2.* A court may exercise personal jurisdiction over  
15 a person domiciled in, organized under the laws of, or main-  
16 taining his or its principal place of business in, this state as to  
17 any cause of action.

18 *Section 3.* (a) A court may exercise personal jurisdiction  
19 over a person, who acts directly or by an agent, as to a cause  
20 of action arising from the person's

21 (1) transacting any business in the state;

22 (2) contracting to supply services or things in this state;



23 (3) causing tortious injury by an act or omission in this  
24 state;

25 (4) causing tortious injury in this state by an act or omis-  
26 sion outside this state if he regularly does or solicits business,  
27 or engages in any other persistent course of conduct, or derives  
28 substantial revenue from goods used or consumed or services  
29 rendered in this state;

30 (5) having an interest in, using or possessing real property  
31 in this state; or

32 (6) contracting to insure any person, property or risk lo-  
33 cated within this state at the time of contracting.

34 (b) When jurisdiction over a person is based solely upon this  
35 section, only a cause of action arising from acts enumerated  
36 in this section may be asserted against him.

37 *Section 4.* When the exercise of personal jurisdiction is au-  
38 thorized by this Article, service may be made outside this  
39 state.

40 *Section 5.* When the court finds that in the interest of sub-  
41 stantial justice the action should be heard in another forum,  
42 the court may stay or dismiss the action in whole or in part on  
43 any conditions that may be just.

#### 44 ARTICLE II. SERVICE.

45 *Section 6. (a).* When the law of this state authorizes service  
46 outside this state, the service, when reasonably calculated to  
47 give actual notice, may be made:

48 (1) by personal delivery in the manner prescribed for service  
49 within this state;

50 (2) in the manner prescribed by the law of the place in which  
51 the service is made for service in that place in an action in any  
52 of its courts of general jurisdiction;

53 (3) by any form of mail addressed to the person to be served  
54 and requiring a signed receipt;

55 (4) as directed by the foreign authority in response to a  
56 letter rogatory; or

57 (5) as directed by the court.

58 (b) Proof of service outside this state may be made by  
59 affidavit of the individual who made the service or in the man-  
60 ner prescribed by the law of this state, the order pursuant to  
61 which the service is made, or the law of the place in which the  
62 service is made for proof of service in an action in any of its  
63 courts of general jurisdiction. When service is made by mail,  
64 proof of service shall include a receipt signed by the addressee  
65 or other evidence of personal delivery to the addressee satis-  
66 factory to the court.

67 *Section 7.* Service outside this state may be made by an  
68 individual permitted to make service of process under the law  
69 of this state or under the law of the place in which the service

70 is made or who is designated by a court of this state.

71 *Section 8.* When the law of this state requires that in order  
72 to effect service one or more designated individuals be served,  
73 service outside this state under this Article must be made upon  
74 the designated individual or individuals.

75 *Section 9. (a)* A court of this state may order service upon  
76 any person who is domiciled or can be found within this state of  
77 any document issued in connection with a proceeding in a  
78 tribunal outside this state. The order may be made upon ap-  
79 plication of any interested person or in response to a letter  
80 rogatory issued by a tribunal outside this state and shall direct  
81 the manner of service.

82 *(b)* Service in connection with a proceeding in a tribunal  
83 outside this state may be made within this state without an  
84 order of court.

85 *(c)* Service under this section does not, of itself, require the  
86 recognition or enforcement of an order, judgment or decree  
87 rendered outside this state.

#### 88 ARTICLE III. DETERMINATION OF FOREIGN LAW.

89 *Section 10.* A party who intends to raise an issue concern-  
90 ing the law of any jurisdiction or governmental unit thereof  
91 outside this state shall give notice in his pleadings or other  
92 reasonable written notice.

93 *Section 11.* In determining the law of any jurisdiction or  
94 governmental unit thereof outside this state, the court may  
95 consider any relevant material or source, including testimony,  
96 whether or not submitted by a party or admissible under the  
97 rules of evidence.

98 *Section 12.* The court, not jury, shall determine the law of  
99 any governmental unit outside this state. Its determination is  
100 subject to review on appeal as a ruling on a question of law.

#### 101 ARTICLE IV. PROOF OF OFFICIAL RECORDS.

102 *Section 13.* An official record kept within the United States,  
103 or any state, district, commonwealth, territory, insular pos-  
104 session thereof, or the Panama Canal Zone, the Trust Territory  
105 of the Pacific Islands, or the Ryukyu Islands, or an entry  
106 therein, when admissible for any purpose, may be evidenced  
107 by an official publication thereof or by a copy attested by the  
108 officer having the legal custody of the record, or by his deputy,  
109 and accompanied by a certificate that the officer has the cus-  
110 tody. The certificate may be made by a judge of a court of  
111 record having jurisdiction in the governmental unit in which the  
112 record is kept, authenticated by the seal of the court, or by  
113 any public officer having a seal of office and having official  
114 duties in the governmental unit in which the record is kept,  
115 authenticated by the seal of his office.

116 *Section 14.* A foreign official record, or an entry therein,  
117 when admissible for any purpose, may be evidenced by an  
118 official publication or copy thereof, attested by a person au-  
119 thorized to make the attestation, and accompanied by a final  
120 certification as to the genuineness of the signature and official  
121 position (1) of the attesting person, or (2) of any foreign official  
122 whose certificate of genuineness of signature and official posi-  
123 tion either (a) relates to the attestation or (b) is in a chain of  
124 certificates of genuineness of signature and official position re-  
125 lating to the attestation. A final certification may be made by  
126 a secretary of embassy or legation, consul general, consul,  
127 vice consul, or consular agent of the United States, or a dip-  
128 lomatic or consular official of the foreign country assigned or  
129 accredited to the United States. If reasonable opportunity  
130 has been given to all parties to investigate the authenticity  
131 and accuracy of the documents, the court may, for good cause  
132 shown, (1) admit an attested copy without final certification or  
133 (2) permit the foreign official record to be evidenced by an at-  
134 tested summary with or without a final certification.

135 *Section 15.* The statutes, codes, written laws, executive acts  
136 or legislative or judicial proceedings of any domestic or foreign  
137 jurisdiction or governmental unit thereof may also be evidenced  
138 by any publication proved to be commonly accepted as proof  
139 thereof in the tribunals having jurisdiction in the govern-  
140 mental unit.

141 *Section 16.* A written statement that after diligent search  
142 no record or entry of a specified tenor is found to exist in the  
143 records designated by the statement, authenticated as pro-  
144 vided in this Article in the case of a domestic record, or com-  
145 plying with the requirements of this Article for a summary in  
146 the case of a record in a foreign country, is admissible as evi-  
147 dence that the records contain no such record or entry.

#### 148 ARTICLE V. MISCELLANEOUS.

149 *Section 17.* Except as otherwise provided herein, this chap-  
150 ter does not repeal or modify any law of this state

151 (a) authorizing the exercise of jurisdiction on any basis other  
152 than the bases specified in Article I of this chapter;

153 (b) permitting a procedure for service or for obtaining testi-  
154 mony, documents or other things for use in this state or in a  
155 tribunal outside this state other than the procedures prescribed  
156 in Article II and Article III of this chapter; or

157 (c) authorizing the proof of official records or any entry or  
158 lack of entry therein by any method other than the methods  
159 prescribed in Article V of this chapter.

160 *Section 18.* This chapter shall be so interpreted and con-  
161 strued as to effectuate its general purposes to make uniform  
162 the laws of those states which enact it.

1 SECTION 2. If any provisions of this act or the application  
2 thereof to any person or circumstances is held invalid, the in-  
3 validity does not affect other provisions or applications of the  
4 act which can be given effect without the invalid provision or  
5 application, and to this end the provisions of this act are  
6 severable.

1 SECTION 3. Section seventy of chapter two hundred and  
2 thirty-three of the General Laws is hereby repealed.

## DISSENTING OPINION OF JUDGE ADLOW

Judge Adlow dissents from the opinion of the majority and does not recommend the adoption of the Interstate and International Procedure Act in Massachusetts.



## II CRIMINAL LAW AND PROCEDURE

### Should There Be District Court Hearings Prior To Indictment?

HOUSE . . . 1966 . . . No. 1618

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AN ACT REQUIRING A HEARING IN A DISTRICT COURT PRIOR TO AN  
INDICTMENT BY A GRAND JURY OF A PERSON ACCUSED OF CRIME.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Section 4 of Chapter 263 of the General Laws is hereby  
2 amended by striking out said section and inserting in place  
3 thereof the following section:—

4 *Section 4.* No person shall be held to answer in any court  
5 for an alleged crime nor shall such allegation be considered  
6 by a grand jury until after a hearing before a district court or  
7 in proceedings before a court-martial. At the conclusion of  
8 such hearing the district court may remand the case to the  
9 grand jury or make such other disposition that is proper and  
10 in order.

At the present time, section 4 of Chapter 263 reads as follows:

“§4. *Prosecution of crimes; manner.* No person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court or in proceeding before a court-martial.”

Prosecutions before trial justices were discontinued when the position of trial justice was abolished by Chapter 319 of the Acts of 1963.

The district courts of the Commonwealth have criminal jurisdiction concurrently with the superior court under the provisions of Chapter 218, §26 which reads as follows:

“§26. *General Provisions.* District courts shall have original jurisdiction, concurrent with the superior court, of the following offences committed within their respective districts or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections eighteen and nineteen of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for

money or other property, and of uttering as true such a forged note or order, knowing the same to be forged, if in either case the sum of money or the value of the property named in such note or order does not exceed one hundred dollars. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven."

The district courts may not impose a sentence to the state prison. They also have certain jurisdiction over juvenile offenders.

The jurisdiction of the district court is therefore limited.

In the case of a crime which is not within the final jurisdiction of the district court, the accused must be held for appearance before the superior court. In such a case, the accused is permitted to waive indictment by the Grand Jury and proceed to trial as if had been indicted. At present, it is not necessary to first obtain a complaint in the district court. A person may be indicted by the Grand Jury without any previous proceedings against him.

The proposed amendment to Chapter 263, §4 would require a hearing in a district court before an indictment.

Provisions for courts-martial will be found in Chapter 33 of the General Laws which embodies the Military Justice Act of 1954.

We do not wish to discuss courts-martial at this point.

The proposed change requires a hearing before the district court in all criminal cases.

We understand that it is the purpose of those who support this idea to have a full scale public hearing, in all essentials equivalent to a trial, before the district court would decide to send the case to the Grand Jury or dispose of it on the basis that it was within the final jurisdiction of the district court. We presume that the proponents did not intend to affect the right of appeal given under Chapter 218, §31. Under this section, a person convicted in the district court has a right of appeal for his jury trial in the superior court.

We also doubt that the proponents of the bill intend to affect section 8A of Chapter 263 which reads:

"§8A. Acquittal on merits in district court; effect. A person shall not be held to answer in a district court to a second complaint for an offense for which he has already been tried upon the merits in said court."

Under the present law, the fact that a district court dismisses a criminal complaint does not prevent the district attorney from seeking an indictment for the offense involved.

The proposed bill undermines the authority of the district attorney to present accusations of crime before a Grand Jury of twenty-three

citizens of this Commonwealth who sit in secret session and judge whether one citizen will be branded with a criminal accusation and required to defend himself before the country. Many are called before the Grand Jury but few are chosen to be defendants. The lives of those who are not indicted and their reputation and the well being of their families is preserved.

The proposed legislation would end this protection forever.

House 1618 of 1966 does not stand alone. It appears to us to be part of a program to minimize or eliminate the role of the Grand Jury. We have seen nothing which would fill the gap.

It is obvious that a full scale hearing at the outset in every criminal case would permit the defense counsel to use the judicial system as a convenient investigating bureau. All of the police, experts, and other necessary witnesses would be obliged to appear before the district court judge (who might conceivably be a special justice) and the defense would not be bound by the result of the hearing, because if the crime were within the final jurisdiction of the district court, an appeal could be taken and a jury trial would follow as is now the case.

If the crime were not within the final jurisdiction of the court, the district court would be obliged to "remand the case to the Grand Jury". In the latter case, a defendant and his counsel would have a prior record of everything that the Grand Jury would consider. By virtue of the right of cross examination, a skillful defense counsel could lay bare even the most confidential information in the hands of the prosecutor. He could also obtain the names and locations of all of the witnesses.

We do not think that such a change in criminal procedure will be of any benefit to the people of this Commonwealth. Protection of the rights of the accused do not require a sacrifice of the rights of society to protect itself from clear and present danger. We oppose this bill.

**MANDATORY COMMENCEMENT OF ALL  
CRIMINAL PROCEEDINGS IN DISTRICT COURT  
HOUSE . . . 1966 . . . No. 2296**

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AN ACT GOVERNING THE COMMENCEMENT OF CRIMINAL PROCEEDINGS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Section 4 of Chapter 263 of the General Laws is  
2 hereby amended by adding at the end the following two sen-  
3 tences: — Prosecution of crimes punishable by death or im-  
4 prisonment for life shall be commenced upon a complaint of a  
5 district court or an indictment by a grand jury. Prosecution  
6 of all other crimes shall be commenced upon a complaint of a  
7 district court in accordance with section thirty of chapter  
8 two hundred and eighteen.

1 SECTION 2. Chapter 218 of the General Laws is hereby  
2 amended by striking out section 30, as amended by section 19  
3 of Chapter 194 of the acts of 1941, and inserting in place thereof  
4 the following section: —

5 *Section 30.* Binding over to superior court. **After a hearing**  
6 they shall commit or bind over for trial in the superior court  
7 persons brought before them who appear to be guilty of crimes  
8 not within their final jurisdiction, and may so commit or bind  
9 over persons brought before them who appear to be guilty of  
10 crimes within their final jurisdiction. **Such hearings shall be**  
11 **public, and the accused shall have the right, if he so de-**  
12 **sires, to cross-examine witnesses and to call witnesses on**  
13 **his own behalf, without prejudice to or a waiver of any**  
14 **rights he may have upon arraignment for trial.** In such cases  
15 the clerk of the district court shall forthwith transmit to the clerk  
16 of the superior court a copy of the complaint and of the record;  
17 the original recognizances; a list of the witnesses; a statement of  
18 the expenses and the appearance of the attorney for the de-  
19 fendant, if any is entered; and the report of the department of  
20 mental health as to the mental condition of the defendant, if  
21 such report has been filed under the provisions of chapter one  
22 hundred and twenty-three; **and any other papers requested by**  
23 **the parties. In such cases, where the accused is bound over**  
24 **or committed, he shall be forthwith informed of his right to**  
25 **insist upon indictment by a grand jury or waive indictment**  
26 **under provisions of section four A of chapter two hundred**  
27 **and sixty-three.** If such a person is committed for failure to  
28 recognize as ordered, the superior court shall thereupon have juris-



29 diction of the case against such person for purpose of revising the  
30 amount of bail theretofore affixed. If the district court, after  
31 hearing, orders that an accused not be committed or bound  
32 over for trial in the superior court, the district attorney or  
33 the attorney general shall not seek an indictment before a  
34 grand jury for crimes arising out of the same circumstances  
35 except with the permission of a justice of the superior court  
36 presiding at the term of the said grand jury, which justice  
37 shall be furnished with a transcript or fair summary of the  
38 evidence introduced before the district court and an af-  
39 fidavit containing a fair summary of any additional evidence  
40 expected to be presented to the grand jury.

Section one of the proposed legislation (H. 2296) would change the law so as to require that in all criminal cases not punishable by death or life imprisonment, prosecution would commence in the district court.

The result would be that almost all criminal prosecutions would be commenced by a complaint filed in the district court in the district where the offense had been committed. Hence, if a million dollar bribe changed hands on a golf course on the Cape, the matter would be heard at the Barnstable District Court at which time there would be a full scale hearing with its attendant publicity, confusion and inevitable consequences. What we have said of H. 1618 is therefore applicable to section one of H. 2296. The changes proposed by section two of H. 2296 are as follows:

(a) *A hearing is required in every instance.*

This is not to say that persons are bound over without a hearing at the present time, but the statute does not specifically require a "hearing" but rather an "examination". The purpose of the examination is to see whether or not, in cases not within the final jurisdiction of the district court, there is probable cause existing for an indictment. To conclude that there is probable cause, it is not necessary for the judge of the district court to be convinced beyond a reasonable doubt that the accused is guilty.

(b) *The hearing required by the amendment "shall be public and the accused shall have the right, if he so desires, to cross-examine witnesses and to call witnesses in his own behalf, without prejudice too or a waiver of any rights he may have upon arraignment for trial".*

At present there is no statutory requirement of a public hearing in a case where the issue is solely probable cause. It is hard to make a specific statement that every probable cause hearing is

public, but this is nearly always the case. At present the accused is not required to put on his defense fully, nor is the Commonwealth required to expose the entire case for the prosecution. The change proposed would preserve the rights of the defendant as they now exist but would wipe out the right of the prosecution to reserve its case. The authority given to the defendant to cross-examine and to call his own witnesses is more appropriate where there is going to be a trial with a definite result. Under the law, even as changed by the proposed amendment, neither the defendant nor the Commonwealth would have a final result.

- (c) *The present law restricts the record to a copy of the complaint ("and of the record") the original recognizances, a list of the witnesses, a statement of expenses, the appearance of defense counsel, and the report of the Department of Public health, if any, under §100A of Chapter 123.*

The amendment would also require the district court to forward to the superior court, presumably as part of the record, "any other papers requested by the parties".

- (d) *The proposed amendment requires that the defendant forthwith be notified of his right to instances upon indictment by a Grand Jury etc.*

Section 4A of Chapter 263 now provides that every person who is bound over or committed must be notified of his right to waive indictment and obtain prompt arraignment. We are not sure that this language adds anything to the law which is of any great value to an accused.

- (e) *The new provision is as follows:*

*"If the district court, after hearing, orders that an accused not be committed or bound over for trial in the superior court, the district attorney or the attorney general shall not seek an indictment before a grand jury for crimes arising out of the same circumstances except with the permission of a justice of the superior court presiding at the term of the said grand jury, which justice shall be furnished with a transcript or fair summary of the evidence introduced before the district court and an affidavit containing a fair summary of any additional evidence expected to be presented to the grand jury."*

We have said elsewhere that if a complaint is dismissed, the district attorney is not prevented from seeking an indictment for the same offense.

On June 3, 1966, the Supreme Judicial Court in an opinion by Chief Justice Wilkins (1966 Advance Sheets page 835) in the case

of *Commonwealth vs. Thomas J. Ballou Jr.*, decided that the “allowance of the defendant’s motion to suppress (evidence) in the Charles-town District Court followed by a dismissal of the complaints by the same court” did *not* “constitute a bar to a subsequent indictment and trial of the defendant in the Superior Court for the same offense”.

In this case the defendant’s counsel, F. Lee Bailey, contended that the dismissal of the complaint in the district court put the defendant in jeopardy, hence he could not be indicted and tried.

Chief Justice Wilkins, citing earlier cases, said “there was no jeopardy” by virtue of the dismissal in the district court.

The proposed amendment would require the district attorney to seek permission from a judge of the Superior Court before the indictment could be obtained as was done in the case of *Commonwealth vs. Ballou*.

It should be kept in mind that the court is in the judicial branch of government and the district attorney in his role as prosecutor, and the Attorney General in the same role, are agents of the executive branch, which by the Federal and State Constitution, is charged with the duty of enforcing and executing the law of the land.

To require that a judge give permission to obtain an indictment, even after a district court hearing, would be a great step towards a “one-man Grand Jury” and would involve the judiciary in the decision as to whether or not to prosecute.

When complaints are brought in the district court, there is usually no attorney representing the Commonwealth. The case is handled by the police. The manner in which the case is presented depends largely on the skill and ability of the policemen who may or may not be equal to the occasion. The police have no power of subpoena in advance of the district court hearing. They must respect the constitutional rights of the defendant. They are not usually given sufficient legal training.

The proposed change would mean that the Commonwealth, in order to protect its citizens, would probably have to assign an assistant district attorney to every district court case of any possible consequence. There would also be considerable expense necessary to make sure that all of the evidence was available. If budgetary limitations make it impossible to have proper representation in court to protect the interests of the Commonwealth, we might have a

situation where the police would be virtually the sole arbiters of who shall be prosecuted. If the police declined to apply for a complaint or if they (through no fault of their own) did not present the case with the degree of skill and legal learning which is required under recent constitutional decisions, the Grand Jury might never have an opportunity to look into the matter.

We also note that the judge of the Superior Court who was to decide whether the case should go before the Grand Jury would have to be furnished with a transcript or fair summary of the evidence already produced in the district court and an affidavit relative to additional evidence expected to be produced before the Grand Jury.

This transcript would be paid for by the Commonwealth and presumably a defendant would be allowed to purchase a copy or have one without cost if he was indigent. The cost of a transcript currently is \$1.40 per page for an original and one copy. The average cost of a two hour hearing is about \$80.

### **Concerning Grand Juries As Investigating Bodies**

Both of the bills relative to criminal proceedings in the district courts fail to take into consideration the value of the Grand Jury as an investigating body. Under the present law of the Commonwealth, neither the district attorney nor the Attorney General nor a police officer may summons anyone to appear except before the Grand Jury or before the court. (The exceptions to this statement are not relevant at the moment).

These proposals would wipe out the investigative power of the Grand Jury and unless certain recommendations by the Crime Commission, some of which we mentioned in our 41st Report, were enacted, there would be no investigating body left other than the state and local police.

It is the feeling of the district attorneys in this Commonwealth that a Grand Jury on the local level is the vital weapon in the war against crime.

District Attorney John J. Droney of Middlesex County has written to us recently as follows:

"The grand jury has no counterpart as an instrument in the fight against organized crime. After extensive investigation of the relationship between organized crime and government, the Kefauver Committee reported that much



corruption and organized crime was of local character and that effective local law enforcement was necessary.

The Kefauver Crime Investigating Committee warned all Americans not to rely upon the federal government to control racketeering and organized crime in the United States. The Kefauver Committee advised the people to use their local grand juries to attack conditions in their own communities. See Third Interim Report of the Special Committee to Investigate Organized Crime in Interstate Commerce Senate Report No. 307, 82 Congress 1st session (1951), 3.

The grand jury has had notable success in ridding communities of vice and racketeering. Some examples from history are the 1933 Atlanta Grand Jury which exposed and cleaned up corruption involving county commissioners in the fact of court opposition; in 1933 a corrupt police and prosecution system was investigated and exposed by a grand jury in Cleveland, Ohio. The 1935 exposure of vice and policy rackets in New York under Dewey is well known. In 1937-1938 the Philadelphia grand jury exposed police misconduct. It was a New York Grand Jury which made an investigation into television quiz shows in the 1950's. See in the *Matter of Grand Jury*, 19 Misc. 2d 682, 793 N.Y.S. 2d 553 (Ct. Gen. Sess. 1959). Last year a Middlesex County Grand Jury investigated a stolen car ring operating within the county and successfully prosecuted those responsible.

The investigatory aspect of the grand jury is strengthened by its traditional secrecy.

Traditionally, Grand Jury secrecy is necessary to protect the reputation of the innocent accused, prevent escape of persons about to be indicted, preclude subornation of perjury, insure maximum freedom in Grand Jury proceedings and encourage full and unhampered disclosures by witnesses. See *Goodman v. United States*, 108 F. 2d 516 at 519 (C.A. 9) (1939).

Grand Jury secrecy aids individuals as well as the witnesses. An honest witness whose testimony is based on his partial knowledge of the facts may implicate persons whose activities are shown to be innocent by other witnesses with more complete knowledge. To have this type of information first made public would mean that derogatory material could not be effectively combatted by individuals named by the witness.

The Supreme Court has held that one of the chief purposes in maintaining grand jury secrecy is "to encourage all witnesses to step forward and testify freely without fear of retaliation". See *United States v. Proctor & Gamble*, 356 U.S. 677, 682.

Neither bill under consideration would encourage witnesses to come forth and testify freely as to crime. In public hearings such witnesses might tend to supply a minimum of information and to give "Yes" or "No" answers in response to questions rather than to discourse freely, revealing recollections and information which could provide clues and leads for the Grand Jury in uncovering crime.

If either bill is passed, a witness knowing something about a crime would be obliged to go to the district court, the grand jury, and then the superior court. Witnesses may well refuse to disclose crimes knowing that court hearings are often continued and that he must be there every time the case is called.

The bills make no provisions for district court continuances which could prolong cases and delay trials.

The bills provide no provisions for rehearings if there is later acquired evidence. Nor do they specify what procedure is to be followed if the district court does not issue a complaint although the evidence fully supports facts which sustain a complaint.

The grand jury may afford protection to individuals from arbitrary and unjustified complaints launched by biased persons.

The grand jury is disinterested and impartial as well as being removed from local prejudices and politics. Their deliberations are more likely to result in an impartial assessment of the evidence.

The bills do not make provision for rendition proceedings where indictments are often necessary in order to bring back to the Commonwealth persons who have fled the jurisdiction of this Commonwealth after committing a crime.

The grand jury, in addition, affords the citizenry an opportunity to observe first hand the working of their police and their courts. Moreover, it means that more citizens actively participate in law enforcement in their communities and in local government.

It is clearly in the interest of the Commonwealth that a group of citizens in different counties such as Grand Juries be assembled and given some idea of what is going on in a county so far as law violations are concerned. One of our present difficulties with respect to law enforcement arises, I believe, from the fact that our citizens in general do not participate in this process. The average person's idea of what happens in a criminal proceeding is derived from television, movies or detective stories. These sources are quite apart from actual fact. The more that we can involve the average citizen in the responsibility of law enforcement, the more that citizen is apt to observe and respect our laws and our judicial system".

District Attorney William T. Buckley of Worcester County, District Attorney John P. S. Burke of Essex County, former District Attorney Myron Lane of Norfolk County, District Attorney Edmund Dinis of New Bedford, and District Attorney John R. Wheatley of Brockton all oppose H. 1618 and H. 2296. (1966)

District Attorney Matthew J. Ryan of the Western District of Massachusetts advises us as follows:

"I wish to go on record as being violently opposed to the changes proposed in the above mentioned bills.

The Grand Jury should have the right to initiate cases, and I believe these bills would completely destroy the effectiveness of the Grand Jury. I also believe that it would be extremely costly as far as district court expenses are concerned".

District Attorney Droney also points out that even in states where the criminal complaint is initiated by "information", the investigative powers of the Grand Jury have not been limited as they would be by these bills.

We therefore oppose both bills, and find nothing in them which we can recommend. We call attention to our 41st Report at pages 27-35 where we discussed proposals to broaden the investigative powers of the Grand Jury and the Attorney General. It is in this area that legislation would be useful.

## “OBSTRUCTING” JUSTICE

HOUSE . . . 1966 . . . No. 984

### AN ACT MAKING IT A CRIME TO OBSTRUCT JUSTICE

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 268 of the General Laws is hereby amended by  
 2 inserting after section 6 the following section: —  
 3 *Section 6B.* Whoever, with intent to prevent or obstruct  
 4 the prosecution or defense of any person, knowingly destroys,  
 5 alters, conceals or disguises physical evidence, plants false evi-  
 6 dence, furnishes false information or induces a witness having  
 7 knowledge material to the prosecution or defense to leave the  
 8 commonwealth or to conceal himself shall be guilty of obstruct-  
 9 ing justice. Whoever is convicted of obstructing justice shall be  
 10 sentenced to not more than two and a half years in the house of  
 11 correction or by imprisonment for not more than five years in  
 12 state prison or by a fine not to exceed one thousand dollars or  
 13 both.

The term “obstructing justice” has acquired a meaning in the federal law, and to some extent in the law of this commonwealth, which generally limits its application to interference with judicial proceedings.

Under the United States Code, Sections 1501 to 1509, the obstruction of justice includes assault on a process server, false bail, influencing or attempting to influence jurors, picketing the court house, recording the deliberations of the jury, public demonstrations aimed at the judge or jury, and actual interference with the orders of the court.

Massachusetts has an anti-jury-picketing statute, (Chapter 268 s. 13A of the General Laws) which is based on Title 18 s. 1507 of the United States Code.

In this commonwealth the courts have always had and have always used the power to punish by contempt proceedings those who have obstructed justice.

The contempt of court method of dealing with perjurers, jury fixers, persons who consciously disobey an order of the court, and others who attempt to subvert the authority of the judiciary, is not affected by the proposed legislation one way or the other. Such malefactors will remain subject to the inherent power of the courts to punish for contempt.

We believe that it is the purpose of House 984 of 1966 to assist the commonwealth and its prosecutors and enforcement authorities to deal with situations most of which arise prior to actual trial.

To accomplish such purpose, we recommend the following as a substitute for House 984 of 1966, and we would avoid the use of the term "obstruction of justice" in this connection.

## 1967 DRAFT ACT

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### AN ACT TO MAKE IT A CRIME TO HINDER APPREHENSION OR PROSECUTION OF ONE ACCUSED OF CRIME

Chapter 268 of the General Laws is hereby amended by inserting after section 6 the following section: —

*Section 6B.* Any person who, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime:

- (1) harbors or conceals the other; or
  - (2) provides or aids in providing a weapon, transportation, disguise or other means of avoiding apprehension or affecting escape; or
  - (3) conceals or destroys evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence; or
  - (4) warns the other of impending discovery or apprehension, except that this paragraph does not apply to a warning given in connection with an effort to bring another into compliance with law; or
  - (5) volunteers false information to a law enforcement officer,
- shall be sentenced to not more than two and a half years in the house of correction or (if the actor knows that the other person has been charged or is liable to be charged with a felony punishable by imprisonment for ten years or more) by imprisonment for not more than five years in state prison, or by a fine not to exceed \$1,000, or both.



## ARREST OF DRUG VIOLATORS

HOUSE . . . 1966 . . . No. 1781

AN ACT AUTHORIZING ANY POLICE OFFICER TO ARREST WITHOUT A WARRANT ANY VIOLATOR OF THE SO-CALLED HARMFUL DRUG ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 94 of the General Laws is hereby amended by insert-
- 2 ing after section 217E the following section: —
- 3 *Section 217F.* Whenever a police officer finds or has reason-
- 4 able cause to believe that there has been a violation of any of the
- 5 provisions of sections one hundred and eighty-seven A to two
- 6 hundred and seventeen D, he shall be authorized to arrest such
- 7 violator without a warrant.

HOUSE . . . 1966 . . . No. 2682

RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO REVISION OF LAWS RELATING TO ARREST WITHOUT A WARRANT FOR VIOLATION OF CERTAIN DRUG LAWS.

- 1 *Resolved,* That a special commission, to consist of two members
- 2 of the senate, three members of the house of representatives, the
- 3 commissioner of public health and the attorney general, is hereby
- 4 established for the purpose of making an investigation and study
- 5 relative to the advisability of the revision of laws concerning
- 6 arrests without a warrant made upon reasonable belief that laws
- 7 concerning the use, sale, manufacture or distribution of narcotics
- 8 or harmful drugs have been violated.

It is the apparent intent of H. 1781 to allow arrests without a warrant in connection with violations of the so called “harmful drug act”. The words “harmful drug” are defined in Chapter 94, Section 187A as follows:

“For the purposes of this section, the term ‘harmful drug’ shall mean and include any and all drugs upon which the manufacturer or distributor has, in compliance with federal law and regulations, placed the following:—  
 ‘Caution—Federal law prohibits dispensing without prescription’. The term ‘harmful drug’ shall in particular include any derivative, active principal, preparation, compound or mixture of barbituric acid, amphetamines, argot or any hypotic or somifacient drug”.

The present law on arrest in regard to narcotic drugs (in addition to general provisions of law applicable to all arrests) is set forth in Chapter 94 as follows:

Section 213A. Arrest of persons present where narcotics unlawfully kept, etc. Whoever is present where a narcotic drug is illegally kept or deposited or who ever is knowingly in the company of a person illegally in the possession of a narcotic drug may be arrested without a warrant by an officer or inspector whose duty it is to enforce the narcotic drugs law".

The proposed legislation would allow arrest without a warrant for a variety of offenses, some of which are not of a serious nature and some of which would not normally be committed in the presence of an officer.

The accompanying table shows the essential contents of section 187A to 217D of Chapter 94 and gives the penalty associated with violations of those sections.

## DRUG VIOLATIONS

### Chapter 94 Sections 187A — 217D

SECTION	VIOLATION	PENALTY
187 A	No person shall sell or offer for sale any harmful drug to any person other than a physician, dentist or veterinarian except upon oral or written prescription.	Fine, not more than \$1,500 or imprisonment not more than one year or both
	Dispensing harmful drug in a container which does not bear name and address of druggist, serial no. of prescription, date of filling prescription, name of prescriber, name of patient.	Fine, not more than \$1,500 or imprisonment not more than one year or both
	No sale can be made of harmful drugs unless the container states the proper requirements in obtaining the drugs.	Fine, not more than \$1,500 or imprisonment not more than one year or both
	Physician, dentist or veterinarian failing to deliver to a pharmacist within seven days a written prescription where an oral prescription was given.	Fine, not more than \$25 for each violation described

SECTION	VIOLATION	PENALTY
187 B	Unlawful possession of certain drugs without physician's prescription.	Fine, not more than \$500 or imprisonment not more than 1 year
187 D	Violation of sections 186-195 Posing falsely as a physician, dentist, pharmacist, etc., in sale of drugs.	Fine, not more than \$1,000 or imprisonment not more than two years or both
187 E	Manufacture, possession or sale of harmful drug without obtaining license from department of public health	Fine, not more than \$2,000 or imprisonment not more than six months or both
187 F	No license for the importation of drugs	Fine, not more than \$2,000 or imprisonment not more than six months or both
189 A	Food, Drugs, Cosmetics or devices suspected of being misbranded	Fine, not less than \$100 nor more than \$500 or imprisonment not more than six months
190	Sale of misbranded food or drugs	Fine, not less than \$15 nor more than \$500 or imprisonment not more than six months
191	Delivery of misbranded drugs	Fine, not less than \$25 nor more than \$200
194	Prosecution of dealer establishing guaranty for sale of adulterated or misbranded product	GENERAL PENALTY SEE 217 D
198 A	Manufacture of drugs without first obtaining a license	<i>1st offence</i> - Fine, not less than \$500 nor more than \$1,000 or imprisonment not less than six months nor more than 2 years <i>2nd offence</i> - Fine, not less than \$500 nor more than \$2,000 or imprisonment not less than 5 years nor more than 10 years <i>3rd offence</i> - Fine, \$2,000 and by imprisonment not less than 10 years nor more than 20 years
199	Failure to comply with law on sale and dispensing on prescription, records kept, inspection, etc.	GENERAL PENALTY SEE 217 D
199 A	Failure by physician to follow up oral prescriptions with proper written prescriptions	Fine, not more than \$25

SECTION	VIOLATION	PENALTY
199 B	Sale of narcotic drugs stock in pharmacy discontinuing dealing in narcotics without approval	GENERAL PENALTY SEE 217 D
199 C	Sale by pharmacist to physician, dentist or veterinarian; quantity in excess of limits set forth	GENERAL PENALTY SEE 217 D
199 D	Failure to keep record of narcotic purchases for resale; sales; requisites	GENERAL PENALTY SEE 217 D
199 F	Purchase, acquire or receive drugs with intent to evade Narcotic Drug Law	Fine, not less than \$200 nor more than \$2,000 or imprisonment not more than 2 years
200	Administration of narcotic drug under order of physician or dentist; Failure to return unused portion	GENERAL PENALTY SEE 217 D
201	Sale of drugs to unauthorized persons; written orders not signed in triplicate by authorized agent; unauthorized persons using drugs within scope of employment	<i>1st offence</i> - Fine, not less than \$500 nor more than \$1,000 or imprisonment not less than six months nor more than 2 years <i>2nd offence</i> - Fine, not less than \$2,000 and by imprisonment not less than 5 years nor more than 10 years <i>3rd offence</i> - Fine, \$2,000 and imprisonment not less than 10 nor more than 20 years
202	Defacing or removing labels on packages of narcotics	Same penalty as for section 201
203	False representations to obtain narcotic drugs; alteration of prescriptions; false or forged prescriptions	GENERAL PENALTY SEE 217 D
204	Unauthorized statement by officer regarding inspection, prescriptions, orders and records	GENERAL PENALTY SEE 217 D
205	Unlawful possession or transportation of drug	Fine, not more than \$1,000 or imprisonment not more than 3½ years in state prison; jail 2½ years
206	Possession in container other than in which drug was delivered	GENERAL PENALTY SEE 217 D
207	Conviction for violating act; suspension of license or registration	GENERAL PENALTY SEE 217 D



SECTION	VIOLATION	PENALTY
209	Places resorted to by addicts for use of drugs; deemed a common nuisance	GENERAL PENALTY SEE 217 D
210	Failure to keep records by physicians	GENERAL PENALTY SEE 217 D
210 A	Failure of physicians and hospitals to report treatment of chronic sufferers	GENERAL PENALTY SEE 217 D
211	Unqualified person using hypodermic needle; no written prescription by a qualified physician for purchase of needles; no record of sale of needles or instruments	Fine, not more than \$500 or imprisonment for not more than 2 years or both
212	Illegal possession of heroin	<i>1st offence</i> - Fine, not less than \$500 nor more than \$5,000 or by imprisonment not more than 5 years in a state prison <i>2nd offence</i> - Imprisonment not less than 5 years nor more than 15 years
212 A	Illegal sale of heroin	<i>1st offence</i> - Imprisonment in state prison more than 10 years <i>2nd offence</i> - Imprisonment not less than 10 years nor more than 25 years
216	Advertising of prescriptions for, or treatments by narcotics	GENERAL PENALTY SEE 217 D
217	Unlawful sale, exchange, barter, giving or furnishing any narcotic drug, other than heroin	<i>1st offence</i> - Fine not more than \$2,000 and by imprisonment not less than 5 years nor more than 10 years <i>2nd offence</i> - Fine \$2,000 and by imprisonment not less than 10 years nor more than 20 years
217 A	Inducing or attempting another person to use narcotics; especially minors	<i>1st offence</i> - Imprisonment not less than 5 years nor more than 25 years <i>2nd offence</i> - Imprisonment not less than 20 years nor more than 50 years
217 B	Possession of narcotics in violation of Narcotic Drug Laws	<i>1st offence</i> - Imprisonment not less than 5 years nor more than 20 years <i>2nd offence</i> - Imprisonment not less than 10 years nor more than 30 years <i>3rd offence</i> - Imprisonment not less than 15 years nor more than 40 years

SECTION	VIOLATION	PENALTY
217 C	Theft of narcotic drugs from manufacturer, wholesaler, etc.	<p><i>1st offence</i> - fine not more than \$10,000 and by imprisonment not less than 2½ years nor more than 15</p> <p><i>2nd offence</i> - fine not more than \$10,000 and by imprisonment for less than 5 years nor more than 20</p> <p><i>3rd offence</i> - fine not more than \$10,000 and by imprisonment not less than 10 years nor more than 30</p>
217 D	GENERAL PENALTY SECS. 198-217C where a penalty is not specified therein	<p><i>1st offence</i> - fine not more than \$2,000 and by imprisonment not less than 2½ years or more than 5 years</p> <p><i>2nd offence</i> - fine not less than \$500 nor more than \$2,000 and by imprisonment not less than 5 nor more than 10 years</p> <p><i>3rd offence</i> - fine \$2,000 and by imprisonment not less than 10 years nor more than 20 years</p>

From a reading of these various possible violations of the "harmful drug act", (sections 187A-217D of Chapter 94 of the General Laws) it is apparent that arrests without a warrant for some offenses would be ridiculous. If a doctor failed to deliver a written prescription within seven days where he had given an oral prescription, it would serve no useful purpose for society to permit the doctor to be arrested without a warrant (under section 187A) by some over-eager officer. On the other hand, in the more serious crimes involving drugs such as the illegal possession of heroin, it cannot be said from the point of view of the police officer who actually observes the offense that a warrant should be required.

A violation of section 212 of Chapter 94 — illegal possession of heroin — would be a felony. If the officer had reasonable grounds to believe that a felony had been committed, he would now need no warrant to make an arrest although he would need a warrant to make a search.

The officer cannot always know exactly what offense has been committed; the statutes are complex and somewhat confusing. He should be allowed to make an arrest for an offense committed in his presence but should not make an arrest for a violation (not amount-

ing to a felony) which he does not observe. The officer may arrest for a violation of section 187B (possession of drugs without a prescription) which is a misdemeanor and later find that a more serious offense is involved also.

The bill is unacceptable in that it would allow an arrest without a warrant for offenses already committed before the officer appeared on the scene. For that reason, we cannot support it.

We note that the General Court has enacted a law which now permits an officer to arrest *without a warrant* in cases of "glue sniffing" which is a misdemeanor (Chapter 318, Acts of 1966 inserting a section 18 in Chapter 270 of the General Laws). This offense is also of the species of acts intended to create euphoria, excitement, exhilaration etc. or in the current parlance "to turn on".

We have previously said that the police of this commonwealth have been saddled with many new problems. We again recommend that the police be allowed to arrest for a misdemeanor which is actually committed in their presence.

We therefore recommend the following:—

## 1967 DRAFT ACT

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Section 28 of Chapter 276 of the General Laws is hereby amended by striking out such section as it now appears, and substituting in place thereof, the following: — Any officer authorized to serve criminal process may arrest without the issuance of a warrant, and detain a person found by him in the act of stealing property in his presence, regardless of the value of the property stolen, *and may arrest and detain a person who commits a misdemeanor in his presence,* and may arrest and detain a person charged with a misdemeanor, without having a warrant for such arrest in his possession, if the officer making such arrest and detention shall have actual knowledge that a warrant then in full force and effect for the arrest of such person has in fact issued.

# CRIMINAL PROCEEDINGS AGAINST CHILDREN —MOTOR VEHICLE VIOLATIONS

SENATE . . . 1966 . . . No. 1441

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AN ACT AUTHORIZING THE BRINGING OF CRIMINAL PROCEEDINGS AGAINST CERTAIN CHILDREN FOR MOTOR VEHICLE OFFENCES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Chapter 119 of the General Laws is hereby  
2 amended by inserting after section 74, the following new  
3 section: —

4 *Section 74A.* Notwithstanding any provision of this chapter,  
5 a criminal complaint alleging violation of any provision of  
6 Chapters eighty-nine and ninety of the General Laws, which  
7 violation is not punishable by imprisonment and which is  
8 punishable by a maximum fine of not more than one hundred  
9 dollars, may issue against a child between sixteen and seven-  
10 teen years of age without first proceeding against him as a  
11 delinquent child.

1 SECTION 2. This act shall take effect upon its passage.

It is the purpose of this bill to allow the judges of the district courts, in cases involving automobile law violations, to bring juveniles into the regular criminal session of the court and there impose a fine in the maximum sum of one hundred dollars on the juvenile offender.

We are not unmindful that some authorities are of the opinion that the juvenile traffic law violator does not belong in the adult session.

It is our position that under the present law, G. L. Chapter 119, section 58B, it is necessary first to make a finding that the child is a delinquent before the court can impose a penalty for a traffic offense. The court thus must make a declaration that the youngster is a juvenile delinquent by reason of having violated a statute, by-law, ordinance or regulation relating to the operation of motor vehicles.

There are no degrees of delinquency. It is not merely theoretical to state that a boy may be adjudged a delinquent because he operated at an excessive rate of speed; and another boy may be adjudged a delinquent because he commits the crime of grand larceny or arson which are felonies.



Judges are human beings; they do not take any pleasure in branding a boy as a delinquent unless there is a grave and sufficient reason. It is nevertheless not uncommon to have such adjudications made. Juvenile records are supposed to be confidential. It is unfortunate but too often true that the juvenile delinquency label sometimes follows the youthful offender when he has acquired a more reasonable outlook. Many times the mere label is enough to handicap a young man either in the military service, with his employer or in his educational program.

We do not believe that this label should be attached to those who are guilty of relatively minor traffic offenses. At the same time, we believe that such youthful offenders should be obliged to pay a reasonable fine. Some are now adjudicated delinquents because disciplinary measures cannot always be imposed until the adjudication is made.

We believe that the day may not be too far distant when minor traffic offenses will be dealt with in the same manner now governing the disposition of parking violations. There is no reason why the vast majority of minor traffic offenses cannot be made noncriminal. We do not mean that there would not be a hearing in these cases.

In this category we would include speeding, failure to obey traffic control devices or signs, violations of the law of the road, so called, and many other violations which certainly do not involve moral turpitude and which have been made criminal by a legislative prohibition enacted to assure safety on the highways. We certainly do not include such things as operating under the influence of alcohol or drugs, racing, operating negligently so that the lives and safety of the public might be endangered and other more serious offences.

The actual recommendation of the *Attorney General's Committee on Juvenile Crime* in 1966 was as follows:—

“Because of the broad impact of the juvenile delinquency law, if a sixteen year old is apprehended for speeding, that juvenile must be bound over to the juvenile session and the judge must proceed against the juvenile on a delinquency complaint, find the juvenile, and then impose a \$10 fine or he must dismiss the delinquency complaint and then proceed on the criminal side of the court before imposing the fine. Many court officials and judges feel that activating the special legal machinery pertaining to juvenile delinquency in an instance such as this is perhaps the equivalent of using a sledge hammer to drive a thumb tack. Furthermore in the public eye there is a stigma attached to being an adjudicated juvenile delinquent, and it is likely that the label ‘delinquent’ will cause unnecessary future embarrassment.

Therefore, the Committee recommends that Chapter 119 be amended so that the courts can proceed against a sixteen year old charged with a minor traffic violation without the need of first adjudging the sixteen year old a delinquent. In the opinion of the Committee a "minor" traffic violation is one which is not punishable by imprisonment and which is punishable by a maximum fine of not more than one hundred dollars".

A juvenile under sixteen and one-half years of age cannot legally operate a motor vehicle in Massachusetts because he cannot obtain a license. At seventeen, he is no longer subject to the juvenile court.

The purpose of the juvenile court is to protect those of tender years and keep them on the straight and narrow path so that their youthful indiscretions and mistakes will not make their future a dead end. We endorse this purpose from the heart, but we don't think that it helps a youngster to get a record as a delinquent just because he violates a traffic law.

Judges of our district courts inform us that collegiate authorities are not interested in traffic violations and college application forms do not even require the prospective student to give the details or even to answer affirmatively as to traffic cases. Military authorities and employers are likely to take the same position.

We therefore recommend this legislation with a minor revision:—

## 1967 DRAFT ACT

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SECTION 1. Chapter 119 of the General Laws is hereby amended by inserting after section 74, the following new section:

*Section 74A.* Notwithstanding any provision of this chapter, a criminal complaint alleging violation of any provision of section 1, 2, 4, 4A, 4B, and 7A of Chapter 89 or of sections 63, 7, 7A, 8, 9A, 10, 11; 12, 13; 14, 14A, 14B, 15, 17, 18, 20A, 20C, 20D; 22B, and 25 of Chapter 90; which violations are not punishable by imprisonment and which violations are punishable by a maximum fine of not more than one hundred dollars, may issue against a child between sixteen and seventeen years of age without first proceeding against him as a delinquent child.

We do not believe that this should be an emergency law but rather that ample notice be given of its passage to all those who will be concerned with its enforcement as well as those who will be subject to it. Although the license age is sixteen and one-half, we would

make this law apply at sixteen. Boys of sixteen. can be expected to operate motor vehicles even if they do not read law books.

## UNAUTHORIZED OPENING OR PUBLICATION OF PAPERS, LETTERS, ETC.

HOUSE . . . 1966 . . . No. 2300

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### AN ACT PROHIBITING UNAUTHORIZED OPENING OR PUBLISHING OF A LETTER, TELEGRAM, OR PRIVATE PAPER

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 266 of the General Laws is hereby amended by insert-  
2 ing after section 139 the following section.—

3 *Section 140.* A person who wilfully, and without authority:

4 1. Opens or reads, or causes to be opened or read, a sealed  
5 letter, telegram or private paper; or

6 2. Publishes the whole or any portion of such a letter, or  
7 telegram, or private paper, knowing it to have been opened or  
8 read without authority; or,

9 3. Takes a letter, telegram or private paper, belonging to an-  
10 other, or a copy thereof, and publishes the whole or any portion  
11 thereof; or,

12 4. Publishes the whole or any portion of such letter, telegram,  
13 or private paper, knowing it to have been taken or copied with-  
14 out authority; or,

15 5. Publishes or causes to be published, or connives at the pub-  
16 lication of any letter, telegram, or private paper or of any por-  
17 tion of any letter, telegram, or private paper found on, or  
18 among the effects of, any person who has been dangerously  
19 wounded, or who has committed suicide, or who has died sud-  
20 denly, or who has been found dead, unless such letter, telegram,  
21 or private paper shall have been produced pursuant to law be-  
22 fore a coroner at an inquest, and the publication of such letter,  
23 telegram, or private paper, or of such portion of such letter,  
24 telegram, or private paper shall have been declared by that  
25 coroner in writing to be necessary to aid in the discovery of a  
26 crime, or of the identity of the wounded or deceased person; or,

27 6. Any person having or obtaining access, either with or  
28 without the consent of the lawful owner, to any original list,  
29 compilation or other collection of the names of customers or  
30 subscribers not less than five hundred in number, or to any  
31 other original list, compilation or other collection of names

32 not less than five hundred in number, used in connection with  
33 any lawful business or occupation whatsoever, and who, with-  
34 out the consent of such lawful owner, shall take possession of  
35 any such original list, compilation, or other collection, or any  
36 part thereof, or shall make or cause to be made, or take pos-  
37 session of, a copy or duplication thereof, or of any part thereof,  
38 or who shall aid, abet or incite any other person to take or to  
39 copy or to cause to be copied or taken, any such list, compila-  
40 tion or collection, or any part thereof; or,

41 7. Any person who may have heretofore obtained or may  
42 hereafter obtain any such list, compilation or other collection  
43 specified in subdivision six hereof, or any part thereof, or any  
44 copy or duplication of such list, compilation or collection or  
45 any part thereof, or the information contained in any such list,  
46 compilation, collection or any part thereof, and who, without  
47 the consent of the lawful owner of the original of any such list,  
48 compilation or collection, and with notice or knowledge of his  
49 rights, may at any time hereafter, make use of or attempt to  
50 make use of any such list, compilation or collection, or any  
51 part thereof, or of any copy or duplication of the whole or any  
52 part thereof, or of the information contained in any such list,  
53 compilation, collection or copy or duplication or any part  
54 thereof, for his own benefit or advantage, or that of any per-  
55 son other than said lawful owner, shall be punished by a fine  
56 of not less than five hundred dollars nor more than five thousand  
57 dollars, and for imprisonment of not more than three years  
58 in jail.

This bill proposes a fine or a jail term for unauthorized prying into the letters, telegrams or private papers of others. It would also make criminal the purloining or copying of business records such as customers' lists.

The first two sections deal with the opening, reading and publishing of *sealed* letters, telegrams or "private papers". Sections three and four deal with the taking away or the publication of similar document, sealed or not, or parts thereof. Section five deals with the documents found on the person or among the effects of a person who meets sudden death. There are exceptions where such papers are needed for identification or for other lawful uses. Sections six and seven pertain to business records such as lists of customers or subscribers. Under the terms of the bill other business records are also covered. The proposed bill would make it a criminal offense to copy or take away such business records unless authorized by the lawful owner.



The penalty for the violation of this proposed law would be by a fine or imprisonment.

A criminal law should be such as to clearly define the offense and the elements involved. No criminal statute should be vague or indefinite in any particular. Here for example we see the undefined term "private paper" and note that this term might embrace anything in writing. A poem may be a "private paper".

We understand that penalties are already provided for interference with the United States mails. It would be best to leave such penalties to Congress since the mails involve an area where there can be little doubt that the legislative authority of the United States should control.

### **Telegrams**

We hesitate to urge a law protecting the secrecy of a telegram since this type of message is notoriously the opposite of secret. Again, we feel that this area is one where the Congress should act. Telegrams should be protected by a uniform federal law, if a law is needed.

We cannot reach the conclusion that the prying into "private papers", whether sealed or unsealed, should be made a crime.

It may be that this commonwealth has as yet no definite legislative policy regarding invasions of privacy. The wrongful publication of the private "papers" of another can form the basis for a claim for damages in the appropriate case. We do not enter into a discussion of the civil aspects of this matter at this time because we do not understand that such aspects are involved.

There is no clear test in the proposed statute to determine under normal circumstances what authority would be necessary to exempt the accused from criminal liability.

### **Business Papers**

The last part of the bill deals with customers' lists and other business records. It is not possible to say to what records the law would apply. We would say at the present time that it is well settled that anyone who makes use of confidential business information without the consent of the lawful owner may be enjoined by a court of Equity, and such a person may be held liable in civil damages in the proper case. The property interest in such lists is thus now fully protected by the law of this commonwealth. We note that in the

decisions of the supreme judicial court which deal with trade secrets there are often close questions of fact as to whether or not the defendant had a lawful interest in the information or list. Such controversies belong in the equity court, not in the criminal court.

A criminal conviction will not restore to the true owner his property rights in the trade secrets nor will the fine or imprisonment prevent the unlawful use of those secrets.

We therefore oppose House 2300 in its entirety.

## POST-CONVICTION PROCEDURE ACT

SENATE . . . 1966 . . . No. 256

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AN ACT FOR PROVIDING RELIEF IN CRIMINAL CASES FROM CONVICTIONS OBTAINED AND SENTENCES IMPOSED WITHOUT DUE PROCESS OF LAW.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Sections nine through thirteen of chapter two hundred and  
2 fifty of the General Laws are hereby repealed, and the follow-  
3 ing chapter two hundred and fifty A is hereby enacted:

### 4 POST-CONVICTION PROCEDURE ACT

5 *Section 1. Post-Conviction Procedure Established; Purpose;*  
6 *Other Procedures Superseded.* This act establishes a post-  
7 conviction procedure for relief from convictions obtained and  
8 sentences imposed without due process of law. The procedure  
9 hereby established supersedes all common law and statutory pro-  
10 cedures for the same purpose that exist when this act becomes  
11 effective including habeas corpus and writ of error. However,  
12 nothing in this act limits the availability of remedies in the  
13 trial court or on direct appeal.

14 *Section 2. Eligibility for relief.* To be eligible for relief under  
15 this act, a person must initially file a petition under the provi-  
16 sions of Section four hereof and must prove that:

- 17 (a) Petitioner has been convicted of a crime;  
18 (b) Petitioner is either incarcerated under a sentence of  
19 death or imprisonment or on parole or probation;  
20 (c) The conviction or sentence of the petitioner violates the  
21 constitution or laws of the United States or the consti-  
22 tution or laws of this Commonwealth and;  
23 (d) The error resulting in the conviction and sentence of  
24 the petitioner has not been finally litigated or waived.

25 *Section 3. When an Issue is Finally Litigated or Waived.*

26 (a) For the purposes of this Act an issue is finally litigated  
27 if

28 (1) it has been raised in the trial court, and the trial  
29 court has ruled on the merits of the issue, and the  
30 petitioner has knowingly and understandingly failed  
31 to appeal the ruling of the trial court; or

32 (2) the Supreme Judicial Court has ruled on the merits  
33 of the issue

34 (b) For the purposes of the act an issue is waived if

35 (1) the petitioner with knowledge and understanding  
36 failed to raise an issue which could have been raised  
37 either before the trial, at the trial, on appeal, in a  
38 habeas corpus proceeding or any other proceeding  
39 actually conducted, or in a prior proceeding actually  
40 initiated under this act; and

41 (2) the petitioner is unable to prove the existence of  
42 extraordinary circumstances to justify his failure to  
43 raise the issue.

44 (c) There is a rebuttable presumption that a failure to ap-  
45 peal a ruling or to raise an issue is an omission done  
46 knowingly and with understanding.

#### 47 INITIATION OF PROCEEDINGS

48 *Section 4. Petition.* Any person who desires to obtain relief  
49 under this act may initiate a post-conviction proceeding by  
50 filing a petition at any time with the clerk of the court in  
51 which he was convicted. A petition must be in the following  
52 form:

53 (a) The petition must state it is a Post-Conviction Pro-  
54 cedure Act Petition. It must include the name of the petitioner,  
55 his place of confinement, if any, an identification of the pro-  
56 ceedings in which the petitioner was convicted, the place of  
57 conviction, the date of the entry of judgment, the sentence  
58 imposed, the alleged error on which the petition is based, the  
59 relief desired, and an identification of all previous proceedings  
60 that the petitioner has taken to secure relief from his convic-  
61 tion or sentence.

62 (b) The petition must include either affidavits, records, and  
63 other supporting evidence or state why they are not included.

64 (c) The petitioner may, but need not include argument or  
65 citations and discussion of authorities.

66 (d) All facts within the personal knowledge of the petitioner  
67 must be set forth separately from other allegations of fact.

68 *Section 5. Docketing.* Upon receipt of a petition seeking  
69 relief under this act, the clerk of the court in which the  
70 petition is filed shall immediately docket the petition and

71 promptly notify the court and the Attorney General of the Com-  
72 monwealth.

73 *Section 6. Amendment and Withdrawal of Petition.* The court  
74 may grant leave to amend or withdraw the petition at any time.  
75 Amendment shall be freely allowed in order to achieve sub-  
76 stantial justice. No petition may be dismissed for want of specif-  
77 icity unless the petitioner is first given an opportunity to clarify  
78 his petition.

79 *Section 7. Answer.* The Attorney General of the Common-  
80 wealth shall respond by answer or motion within thirty (30)  
81 days after the petition is docketed or within such time as the  
82 court orders. If the petition does not include records of the  
83 proceedings required to be attached thereto by section four here-  
84 of, the respondent shall file with his answer the records or  
85 parts of records that are material to the questions raised in  
86 the petition.

87

## HEARINGS

88 *Section 8. When Hearing Granted.* If a petition alleges  
89 facts that if proven would entitle the petitioner to relief, the  
90 court shall grant a hearing. However, the court may deny a  
91 hearing if the claim of the petitioner is frivolous on its face  
92 and without support either in the record or from other evi-  
93 dence submitted by the petitioner. The court may also deny a  
94 hearing on a specific question of fact when a full and fair  
95 evidentiary hearing upon that question was held at the original  
96 trial or at any later proceeding.

97 *Section 9. Scope of Hearing.* The hearing may extend only  
98 to the issue raised in the petition or answer.

99 *Section 10. Requirement of Full and Fair Hearing.* The  
100 petitioner shall have a full and fair hearing on his petition.  
101 The court shall receive all evidence that is relevant and neces-  
102 sary to support the claims in the petition including affidavits,  
103 depositions, oral testimony, certificate of the trial judge, and  
104 relevant and necessary portions of the transcripts of prior  
105 proceedings.

106 *Section 11. Evidence Recorded.* Evidence at the hearing  
107 shall be recorded.

108 *Section 12. Right to Personal Appearance.* The petitioner  
109 has the right to appear in person at the hearing.

110 *Section 13. Order of the Court.* If the court finds in favor  
111 of the petitioner, it shall order appropriate relief and issue any  
112 supplementary orders as to rearrangement, retrial, custody,  
113 bail, discharge, correction of sentence, or other matters that  
114 are necessary and proper.

115 *Section 14. Final Disposition of the Petition.* The order



116 finally disposing of the petition shall state the grounds on  
117 which the case was determined and whether a Federal or a  
118 Commonwealth right was presented and decided. Such order  
119 shall constitute a final judgment for purposes of review.

120 *Section 15. To Whom Copy of Order Sent.* A copy of the  
121 order shall be sent to the petitioner, counsel of record for the  
122 petitioner, and the Attorney General of the Commonwealth.  
123 The original order shall be filed with the court records and  
124 papers in the case.

125 RIGHT OF APPEAL

126 *Section 16. Who May Appeal.* The party aggrieved by an  
127 order under section thirteen or section fourteen hereof may  
128 apply to the Supreme Judicial Court for leave to appeal from  
129 the order within thirty days from the day on which the order  
130 is issued.

131 *Section 17. Contents of Application for Leave to Appeal.*  
132 An application for leave to appeal must be accompanied by a  
133 record which contains the petition, answer or motion of the  
134 Attorney General and the order and statement of the court.  
135 In addition the Supreme Judicial Court may order a transcript  
136 of the post-conviction hearing certified to it as part of the  
137 record in its discretion or on motion by either party.

138 INDIGENTS

139 *Section 18. Right To Record.* If the court finds that the  
140 petitioner is unable to pay for a copy of the record of any trial  
141 court proceeding or appellate court proceeding that he seeks  
142 to attack under this act, the court shall furnish her or him  
143 with a certified copy of the record without charge.

144 *Section 19. Right to Transcript.* If a hearing is granted  
145 under section eight hereof and the court finds that the peti-  
146 tioner is unable to pay for a copy of the transcript of a pro-  
147 ceeding that he seeks to attack under this act, the court shall  
148 furnish her or him without charge a copy of such portions of  
149 the transcript as the petitioner certifies and the court finds to  
150 be relevant and necessary to support any allegation in the  
151 petition.

152 *Section 20. Right to Counsel.* If a hearing is granted under  
153 section eight hereof and the court finds that the petitioner is  
154 unable to employ counsel, the court shall appoint counsel for  
155 her or him.

156 *Section 21. Right to Counsel on Appeal; Costs of Appeal.*  
157 If an appeal is sought by the petitioner under section sixteen  
158 hereof and the Supreme Judicial Court finds that the appeal is  
159 not frivolous and that the petitioner is unable to pay the costs  
160 of the appeal or to employ counsel, the Supreme Judicial Court  
161 shall appoint counsel for the petitioner, and shall provide for

162 payment of the costs of the appeal shall order the respondent  
163 to furnish the documents required to accompany the applica-  
164 tion for leave to appeal.

In several jurisdictions around the nation, it has been suggested that existing legal machinery available for the review of a criminal conviction or sentence is not adequate to guarantee the defendant his rights under the Federal and State Constitutions. We can appreciate that the need for progress in this area may be evident in some jurisdictions, but we are unable to say that citizens of Massachusetts or those who come before its courts, will easily lose their constitutional rights here.

In our 41st Report for 1965 at pps. 42-46, we discussed a Post-Conviction Procedure Act suggested by the Commissioners on Uniform State Laws, and we deferred further comment until the report of the Committee on Minimum Standards of Criminal Justice of the American Bar Association. This committee approved a final revised version of a Uniform Post-Conviction Procedure Act in August 1966 which was approved by the American Bar Association. We have reviewed this Uniform Revised Act carefully and find that it is in essence a restatement of the proposed uniform act set forth at page 42 of our 41st Report.

Senate No. 256 of 1966 is a bill designed to wipe out the Writ of Error in criminal proceedings, and to supersede Habeas Corpus as well.

Writs of Error must not be confused with an Appeal. They are independent attacks on a conviction or sentence based on matters which could not or should not be raised in an Appeal. Chapter 250, §1-2 and 9-13 of the General Laws apply to Writs of Error.

This writ has been used to review proceedings for criminal contempt. Errors of fact such as the sanity of the defendant, the fact that the defendant was a minor, the death of a defendant and other matters of fact which were not heard and determined at the time of the trial were held to be reviewable by Writ of Error. More recently our Supreme Judicial Court has extended the Writ of Error to allow a collateral attack based on the denial of due process of law and other constitutional rights.

The scope of the Writ of Error in Massachusetts as a Post-Conviction Procedure is demonstrated to some extent by the following three cases which were decided within the last ten years.

## WRIT OF ERROR 1957

### **An Accretion of Prejudicial Happenings During A Trial; — No Fair Trial**

The defendant was 22 years old when tried. He was indicted for assault with a dangerous weapon and on two counts of robbery arising out of three taxi hold-ups. He was tried in 1952 and convicted. The defendant was an unfortunate ill-educated individual who had been in trouble of a minor sort regularly. During the trial the judge made curious references to the right of a defendant to take the stand which seemed to prejudice his rights; it appeared that no counsel was appointed for him (even a juror questioned this) and the defendant was cross examined by the judge on a vital piece of evidence. *Brown v. Commonwealth* 335 Mass. 476.

## WRIT OF ERROR 1963

### **Coercion By The Judge**

The judge informed defense counsel that the 18 year old defendant on a rape indictment should plead guilty and that if he insisted on a trial he would get two consecutive life sentences. Defense counsel said he should not plead guilty. Later there was talk that a guilty pleas would assure the defendant of a fifteen year sentence. The judge was attempting to protect the rape victim but the Supreme Judicial Court said it was coercion. *Letters v. Commonwealth* 346 Mass. 403.

In *Guilmette v. Commonwealth*, 344 Mass. 527, the court took a liberal view of the Writ of Error and indicated that it was available as of right (and not in the discretion of the Supreme Judicial Court) on "The issue of coercion or any of the issues of fact which there was no legally sufficient opportunity to litigate at trial".

## WRIT OF ERROR 1961

### **Jail Term For Contempt Due To Plea Of Self-Incrimination By Grand Jury Witness**

Witness before the Grand Jury twice refused to answer questions relative to what he knew of the events surrounding the murder of Joseph DeMarco whose bullet riddled body was found at a dump. A judge ordered the witness to answer and subsequently, after further proceedings, he was sentenced to a year in jail. The charge was contempt of court. The witness claimed that he was not given a chance to show that his answers would incriminate him. The Supreme Judicial Court agreed with the jailed witness and said that his contention was correct.

*Sandrelli v. Commonwealth* 342 Mass. 129

What a Writ of Error cannot accomplish is shown in *Guerin v. Commonwealth* 337 Mass. 268 (1958) where the court said that under Chapter 250, §1, 2, 9-13 of the General Laws the "whole subject" of Writs of Error is covered. In the *Guerin* case, the defendant was represented by "experienced counsel" who did not attempt to appeal or otherwise bring the case before the Supreme Judicial Court after the 1952 trial for several sex offenses including incest. The defendant waited until 1956 to file his Writ of Error. The court says of this:

"Later he assigned fifty-five errors. It would add nothing to our jurisprudence to analyze the assignment in detail particularly where the petitioner's present counsel does not do so. Many of those assigned relate to alleged errors at the trial which are not open on writ or error. Several make vague and sweeping suggestions of violation of rights under the Constitution of the United States or under our own Constitution."

The Writ of Error in the *Guerin* Case was apparently a proceeding by which a late appeal was sought.

No one can criticize the defendant who was serving in a State Prison for attempting to reverse his sentence by any means known to the law, but at the same time such proceedings cannot be sustained on that basis.

By way of an observation in the case of *Shoppers' World Inc. v. Board of Assessors* of Framingham, 348 Mass. 366, the court said:

"Re-examination of the scope of remedies is not unusual, and may be essential to meet evolving constitutional interpretations. An example of this is the gradual and necessary expansion of the statutory writ of error (G. L. Chapter 250, §1,9) as a post-conviction remedy broad enough to deal with constitutional problems arising under recent decisions of the Supreme Court of the United States". In this observation Justice Cutter noted the three cases outlined above as instances where the writ of error was used to meet new constitutional issues.

Under Section 2 of the proposed Post-Conviction Procedure Act (Senate No. 256) certain conditions are necessary to entitle a convicted person to a review of his case by the court. The conditions include those which now entitle the prisoner to a writ of error as well as those which entitle one to Habeas Corpus under Chapter 248, §1 et seq of the General Laws. Habeas Corpus is a command issued by the court to an officer to produce the body of a person in custody in order to test whether or not that custody is lawful. The law of Massachusetts provides in Chapter 248, §1:

"Whoever is imprisoned or restrained of his liberty may, as of right and of course, prosecute a writ of Habeas Corpus, according to this chapter, to obtain releases from such imprisonment or restraint, if it proves to be unlawful, unless—



First, He has been committed for treason or felony or on suspicion thereof, or as an accessory before the fact to a felony, and the cause has been plainly expressed in the warrant of committment.

Second, He has been convicted or is in execution upon legal process, civil or criminal.

Third, He has been committed on mesne process in a civil action in which he was liable to arrest and imprisonment, unless excessive and unreasonable bail was required”.

Under this chapter, Habeas Corpus is available, for example, to an inmate of the State Prison who contended that certain time spent at the Bridgewater State Hospital should have been deducted from his sentence thereby entitling him to release. In *Re Stearns Petition*, 343 Mass. 53.

A person under sentence should also have the rights given to one convicted.

Because our existing procedures are rooted in the past some argue that a codified set of rules would provide a better method of review. We have examined the proposed post-conviction code set forth in S. 256, and we reach the conclusion that it introduces constrictions which do not seem to further assure the constitutional rights of the citizen. We believe that existing procedures guarantee to all the protection of their liberties and rights under the Federal and State Constitutions. If zealous and resourceful defense counsel seek to explore every avenue in order to secure the release of their clients or if a prisoner can discover some approach, some writ, or some novel method by which to achieve his release, we register no objection. The exploration of such avenues, the discovery of such approaches and writs, and the employment of novel methods either in the courts of this commonwealth or in the Federal courts do not constitute proof that there is a denial of constitutional rights but rather they prove the wisdom of the saying “Where there is life, there is hope”.

We do not recommend any Post-Conviction Procedure Act at this time.

### III PROCEDURAL IMPROVEMENTS

#### —DISTRICT COURTS

#### Summary Judgments In District Court

HOUSE . . . 1966 . . . No. 1222

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AN ACT RELATIVE TO MAKING MOTIONS FOR SUMMARY JUDGMENTS AND AFFIDAVITS  
APPLICABLE TO DISTRICT COURTS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Section 141 of Chapter 231 of the General Laws is hereby
- 2 amended by adding the words: — fifty-nine, — after the words
- 3 “fifty-eight A”.

Section 141 of Chapter 231 of the General Laws is the section which lists those provisions of the practice act (Chapter 231) which are applicable to the district courts and the Boston Municipal Court. Section 59 of Chapter 231 reads as follows:

*Motion for summary judgment; affidavits.* In any action of contract, except an action against an executor or administrator for liability of the deceased, at any time after the completion of the pleadings counsel for either party may file an affidavit that in his belief there is no genuine issue of material fact but only questions of law in connection with all or some part of the action, or of some issue determinative thereof, and may move for an immediate entry of judgment thereon. Said motion may be accompanied by affidavits on personal knowledge of admissible facts as to which it appears affirmatively that the affiants would be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion unless within twenty-one days or such further time as the court may order, contradictory affidavits are filed, or the opposing party shall file an affidavit showing specifically and clearly reasonable grounds for believing that contradiction can be presented at the trial but cannot be furnished by affidavits. Copies of all motions and affidavits hereunder shall be furnished upon filing to opposing counsel. If admissions in the pleadings, interrogatories or admissions under section sixty-nine, stipulations or affidavits hereunder show affirmatively, that except as to the amount of damages no genuine issue of material facts exists and that there is nothing to be decided except questions of law, an order for default, or judgment for the moving party, shall forthwith be entered if he shall be entitled thereto as a matter of law, subject to an assessment of damages, if required.

If admissions in the pleadings, interrogatories or admissions under section sixty-nine, stipulations or affidavits hereunder, show affirmatively, in any suit in equity or petition for declaratory judgment which suit or petition involves

rights under a written contract, that no genuine issue of material facts exists and there is nothing to be decided except questions of law, or the form of the decree, or the nature of the relief to be granted, the court, after hearing, on motion for final decree, may enter forthwith such decree or judgment as may be appropriate”.

The last paragraph of section 59 can not apply to proceedings in the district courts since the district courts have no jurisdiction of suits in equity or petitions for declaratory judgment.

The present purpose of Chapter 231, Section 59 is to allow an expeditious disposition in a contract case in the Superior Court where there is no real issue of fact.

If the court can determine by means of affidavits and pleadings that no dispute exists as to any material fact, there is obviously no necessity for a trial.

It is reasonable to assume that a party who has a good defense to such an action can set forth this defense in an affidavit, or otherwise, and thereby prevent a summary judgment.

We do not believe that summary judgments are as widely utilized as they might be.

We think that it is appropriate to extend the summary judgment idea to the district courts as far as this is possible.

If the summary judgment procedure accomplishes nothing else, it does tend to narrow the issues between the parties and thereby expedite the trial of cases.

In view of the fact that the last paragraph of Section 59, which is the most recent amendment to that section of Chapter 231, does not apply to the district courts, we recommend the following:

## **1967 DRAFT ACT**

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Section 141 of Chapter 231 of the General Laws is hereby further amended by adding the words:—

Fifty-nine, excepting so much thereof as pertains to suits in equity or petitions for declaratory judgment, — after the words “fifty-eight A”.

### **Trustee Actions In District Courts**

General Laws, Chapter 223, Section 2 was amended in 1965 by Chapter 752, Section 1 of the Acts of 1965.

By this amendment, it is now possible to commence an action by trustee process in a district court “in any county where any person named in the writ as trustee lives or has a usual place of business . . . ”.

This amendment changes the law which formerly provided that trustee process must be brought in a district court where all of the trustees lived or had their usual place of business.

As can be seen, the amendment facilitates to a certain extent commencement of a suit by trustee process.

### **A Contradiction**

By General Laws, Chapter 246, Section 4, it is provided now that no trustee is required to answer in a district court case (with a minor exception applicable to the Boston Municipal Court) in any county other than where he dwells or has his usual place of business.

It is further provided that if a trustee in a district court action is “out of the county at the time of the service of the original writ upon him, and does not return before final judgment in the action, he shall not be chargeable as trustee”.

General Laws, Chapter 246, Section 4 is thus inconsistent with General Laws, Chapter 223, Section 2. One statute allows commencement of an action where any trustee lives. The other statute provides that he shall not be required to answer beyond the boundaries of his own County.

The concluding sentence of General Laws, Chapter 246, Section 4 requires an amendment because of the existing inconsistency. We, therefore, recommend the following draft act.

## **1967 DRAFT ACT**

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SECTION 1. Chapter 246 of the General Laws is hereby amended by striking out Section 4 and inserting in place thereof the following section:—

“*Section 4. Venue in district courts.* No person shall be held to answer as a trustee in an action in a district court, except as provided in section fifty-four of chapter two hundred and eighteen, in any County where none of the persons named in the writ as trustee live or have their usual place of business; and if a person summoned as trustee in such court is out of the Commonwealth at the time of the service of the original writ upon him, and does not return before final judgment in the action, he shall not be chargeable as trustee”.



## IV. EVIDENCE

### Stenographic Transcripts Of Administrative Proceedings As Evidence

SENATE . . . 1966 . . . No. 225

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AN ACT PROVIDING FOR THE ADMISSIBILITY AS EVIDENCE WHERE COMPETENT OF STENOGRAPHIC TRANSCRIPTS OF ADMINISTRATIVE PROCEEDINGS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter two hundred and thirty-three of the General Laws is  
2 hereby amended by striking out section eighty and inserting in  
3 place thereof the following:—

4 *Section 80.* Transcripts from stenographic notes duly taken  
5 under authority of law in any judicial or administrative pro-  
6 ceeding by a stenographer duly appointed for that purpose and  
7 sworn, when verified by the certificate of such stenographer,  
8 shall be admissible as evidence of testimony given whenever proof  
9 of such testimony is otherwise competent.

At present it is provided in Section 80 of Chapter 233 of the General Laws:—

“§80. *Transcripts from stenographic notes.* Transcripts from stenographic notes duly taken under authority of law in the supreme judicial, superior or probate court by a stenographer duly appointed for the purpose and sworn, when verified by the certificate of such stenographer, shall be admissible as evidence of testimony given whenever proof of such testimony is otherwise competent”.

Senate 225 of 1966 would allow transcripts of testimony taken before administrative boards and tribunals to be admitted into evidence in judicial proceedings in the same manner now established for the admission of transcripts of testimony given before the supreme judicial, the superior and the probate courts.

We do not recommend this bill.

We do not intend to convey the impression that the stenographer is any less skillful, accurate or impartial before an administrative tribunal than before our trial courts. Such is certainly not the case. There are some administrative tribunals, the Division of Industrial Accidents being one example, where the stenographic record is not reduced to a verbatim transcript. A record of this sort cannot stand

on the same basis as a verbatim transcript of testimony regardless of where such testimony was given.

The more significant reason for our objection is that proceedings before administrative bodies in this commonwealth or elsewhere do not have the same qualities one finds in judicial proceedings. Some of the differences are these:—

### **Judicial Proceeding**

1. Presided over by a judge who is familiar with legal principles and rules of evidence.
2. Parties are represented by counsel who are generally skilled in trial procedures.
3. Strict rules of evidence are in effect governing the entire hearing.
4. A trial in the superior court, or the probate court and a hearing in the supreme judicial court is normally the *only* hearing of evidence and testimony.
5. The dignity and solemnity of the judicial proceeding has a salutary effect on the witnesses who appear to weigh their testimony carefully.

### **Administrative Proceeding**

1. Presiding officer may not know legal procedure or principles and is often unfamiliar with rules of evidence.
2. Parties are often not represented by counsel. Often counsel are not trial lawyers.
3. The administrative body is not bound by strict rules of evidence.
4. Almost every administrative hearing can be followed by a trial of the same issues and the same testimony before a court.
5. An administrative hearing is generally informal. Witnesses do not conduct themselves as carefully as before a court; some do not realize the nature of the proceeding.

We believe that consideration of some of these basic differences between the judicial and the administrative tribunal will demonstrate that equal status should not be afforded to the testimony given before the administrative body. It may be that a witness should be as reliable in his sworn testimony no matter where it is given. We merely observe that experience with human nature demonstrates that such is simply not the case. Added to this is the inescapable fact that the administrative tribunal will allow testimony to be given which is inadmissible in court.

Under the provisions of the "State Administrative Procedure Act" G. L. Chapter 30A Section 11, it is provided:—

"Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence whether offered on direct examination or cross-examination of witnesses."

We do recommend an amendment to section 80 of Chapter 233 in order to make that section applicable to the Land Court. It is not uncommon to have litigation concerning the same parcel of land commenced partly in the Land Court and partly in the superior court. There is no reason why transcripts from stenographic notes duly taken in the Land Court should be on any different basis than notes taken in the Probate Court for example. We therefore recommend the following:—

## 1967 DRAFT ACT

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Section 80 of Chapter 233 of the General Laws is hereby amended by inserting after the words “probate court” the words “or land court” so that Section 80, as amended, shall read:—

“§80. *Transcripts from stengraphic notes.* Transcripts from stenographic notes duly taken under authority of law in the supreme judicial, superior or probate court or land court by a stenographer duly appointed for the purpose and sworn, when verified by the certificate of such stenographer, shall be admissable as evidence of testimony given whenever proof of such testimony is otherwise competent.”

## Psychologists And “Counsellors” Statements And Records Of Students To Be Privileged

HOUSE . . . 1966 . . . No. 3200

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AN ACT MAKING INADMISSIBLE IN EVIDENCE CERTAIN CONFIDENTIAL STATEMENTS  
BY A STUDENT TO A PSYCHOLOGIST OR CONSULTANT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 233 of the General Laws is hereby amended by
- 2 inserting after section 23B the following section:—
- 3 *Section 23C.* In any action, or on the trial of an indict-
- 4 ment or complaint for any crime, no statement made by a
- 5 student to a psychologist or counselor employed by an educa-

6 tional institution during the course of treatment, consultation  
 7 or examination, shall be admissable in evidence unless the con-  
 8 sent of such student, his parents or guardian is first obtained  
 9 in writing.

## HOUSE . . . 1966 . . . No. 1383

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### AN ACT PERTAINING TO THE KEEPING OF SCHOOL RECORDS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 The confidential relations and communications between a  
 2 school psychologist or counsellor employed or working in an  
 3 educational institution and client students are placed on the  
 4 same basis as is provided by law, between an attorney and  
 5 client.

6 Said psychologist or counsellor can only divulge the con-  
 7 clusions of confidential relations and communications to a  
 8 third party or parties with the written permission of the par-  
 9 ents or guardians of the client student.

The purpose of these two bills is to protect a "student" from any disclosure of communications received by (1) school psychologists, (2) psychologists and (3) counsellors.

We would first point out that in Massachusetts there is no law or rule which makes communications between a doctor and his patient privileged such as the communications between attorney and client. *Kramer v. John Hancock Mutual Life Insurance Company* 336 Mass. 465, 467. Hence, the communications or revelations made to a psychiatrist by a patient are not (except under Section 23B of Chapter 233 of the General Laws) "privileged". Under the last mentioned section the statements of an accused person made to a psychiatrist cannot be used against him except on the issue of mental condition. If such a statement constitutes a confession of guilt "of the crime charged" it would be completely privileged. We point out that the accused is obliged to submit to the examination before Section 23B applies (See G.L. (Ter. Ed.) Chapter 123, §100 and 100A).

In connection with the vocational rehabilitation of handicapped persons, it is provided in G. L. (Ter. Ed.) Chapter 6, §84 that:—

*"Information or records confidential; penalty for disclosure. Information or records concerning any applicant for vocational rehabilitation shall be confi-*



dential and for the exclusive use and information of the commission in the discharge of its duties. Such information or records shall not be open to the public, notwithstanding the provisions of section ten of chapter sixty-six or other provisions of law, and shall not be admissible in any action or proceeding unless the commission is party to such action or proceeding; provided, however that said applicant, or, with his written authority, his attorney, shall be supplied by the commission with information concerning his own record which is necessary to him in his relations with the commission; and provided, further, that the commission may, in accordance with rules and regulations, on request provide such information to any person or department, division, or sub-division of the commonwealth directly concerned in the vocational rehabilitation of said applicant or to a party to an agreement established under the provisions of section eighty-one; and provided, further, that nothing herein shall be construed to prevent the commission from publishing such information in statistical form without disclosing the identity of the applicant involved.

Whoever, except with the authority of the commissioner or pursuant to his rules and regulations, or as otherwise required or authorized by law, shall disclose such information shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months, or both."

This section indicates a possible "privilege" which is not well known.

In connection with employment security, Section 46 of Chapter 151A of the General Laws provides: —

*"Confidential information; improper disclosure; information as privileged.* Information secured pursuant to this chapter, shall be confidential and for the exclusive use and information of the division in the discharge of its duties hereunder. Such information shall not be open to the public, nor shall it be admissible in any action or proceeding unless the division or the commonwealth is a party to such action or proceeding, or unless such action or proceeding is in the nature of a criminal prosecution under some provision of federal law or under chapter two hundred and sixty-four, or in the trial of a person for homicide, in which case such information shall be produced upon summons of the commonwealth or of the defendant, but any employer or claimant, upon request, shall be supplied by the division with information concerning his own record which is necessary to him in his relations with the division. Whoever, except with authority of the director or pursuant to his rules and regulations, or as otherwise required or authorized by law, shall disclose the same, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months, or both; provided, that nothing herein shall be construed to prevent the director from complying with the provisions of section sixty-four or from conducting any investigation he deems relevant in connection herewith, nor to prevent the director from publishing in statistical form the results of any such investigations without disclosing the identity of the individuals involved.

(a) All information transmitted to the director or his duly authorized representative pursuant to this chapter shall be absolutely privileged and shall not

be made the subject matter or basis in any action of slander or libel in any court of the commonwealth”.

It is to be noted that by Chapter 302 of 1964, the above section allows confidential information to be used in a homicide trial and in certain other criminal prosecutions.

There are current studies concerning possible statutes which would make statements to “psychotherapists” privileged. The term “psychotherapist” would include psychologists. There is no adequate definition of the word “counsellor.” To deal only with students is to avoid the real issue. It is ultimately necessary for the General Court to declare whether or not there shall be a privilege which will prevent the disclosure of statements made by a patient to his doctor or a person to his clergyman, his psychologist, psychotherapist, etc.

We have indicated that in at least two instances the General Court has given a limited privilege.

We do not think that either of the two bills should be enacted. H.1883 would prevent the psychotherapist from stating his conclusions. This is not necessarily desirable. We assume that psychologists and counsellors observe ethical standards in the practice of their professions. H. 3200 is more to the point, but it is so limited that it raises the larger issue of doctor-patient privileges in general.

**We therefore recommend that the General Court initiate a study, in which we would be glad to participate, of the whole question.**

## V TORTS

### Abolition Of Gross Negligence Rule For Passengers

#### CHAPTER 140 — RESOLVES OF 1965

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RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO PERMITTING A PERSON INJURED IN A MOTOR VEHICLE ACCIDENT WHILE A PASSENGER TO RECOVER DAMAGES UPON PROOF OF ORDINARY NEGLIGENCE OF THE OPERATOR

1 Resolved, That the Judicial Council be requested to investigate  
2 the subject matter of current house document numbered 532,  
3 relative to permitting a person injured in a motor vehicle ac-  
4 cident while a passenger to recover damages upon proof of  
5 ordinary negligence of the operator, and to include its conclusions  
6 and its recommendations, if any, in relation thereto, together  
7 with drafts of such legislation as may be necessary to give effect  
8 to the same, in its annual report for the year nineteen hundred and  
9 sixty-six.

HOUSE . . . 1965 . . . No. 532

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AN ACT PERMITTING A PERSON INJURED IN A MOTOR VEHICLE ACCIDENT WHILE A PASSENGER TO RECOVER DAMAGES UPON PROOF OF ORDINARY NEGLIGENCE OF THE OPERATOR.

*Be it enacted by the Senate and House of Representatives in General Court, assembled, and by the authority of the same, as follows:*

1 Chapter 231 of the General Laws, is hereby amended by in-  
2 serting after section 85E, as added by chapter 300 of the acts of  
3 1959, the following new section:  
4 *Section 85F.* In all actions to recover damages for personal  
5 injury or damage to property resulting from an accident involv-  
6 ing a motor vehicle wherein the plaintiff was a passenger, the  
7 plaintiff shall be permitted to recover upon proof of acts or  
8 omissions of the operator which constitute ordinary negligence

Three bills were filed in the 1966 General Court which dealt with the question of whether or not a person injured in a motor vehicle accident while a passenger should be allowed to recover damages

upon proof of ordinary negligence on the part of the operator.

These bills were H. 1786, H. 2136, and H. 2676. They were considered along with S. 240 which was reported in the Senate on April 11 and rejected by the Senate on April 13.

The present law of the Commonwealth of Massachusetts requires proof of gross negligence on the part of the operator in order to permit a passenger to recover damages.

The situation in the nearby states in regard to this principle of law is as follows:

State	Standard Of Conduct
Maine	Ordinary negligence
New Hampshire	Ordinary negligence
Vermont	Gross or willful negligence
Connecticut	Ordinary negligence
Rhode Island	Ordinary negligence
Massachusetts	<b>Gross negligence</b>
New York	Ordinary negligence

It thus appears that in only Massachusetts and Vermont is the gross negligence test required. There are other tests in some states. For example, California requires proof of intoxication or willful misconduct; Illinois requires proof of willful and wanton misconduct; Texas requires proof of intentional heedlessness — reckless disregard.

A recent study indicates that twenty-two states permit recovery on proof of ordinary negligence. The other states require proof of gross negligence, intoxication, willful misconduct, or reckless disregard of the rights of others.

Discussions with representatives of casualty insurers tend to lead to the conclusion that any change in the law is not favored by the insurance industry. From these discussions, it seems also reasonable to conclude that no great increase in claims would follow if Massachusetts were to relax the requirements of proof and allow recovery for ordinary negligence.

In our opinion, the requirement that a passenger prove gross negligence in order to recover against the operator should not remain a part of the law of this Commonwealth.

The application of the rule of evidence set forth in General Laws Chapter 231, §85 is in no way affected by the legislation proposed here.



We recommend the following:—

## 1967 DRAFT ACT

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1 Chapter 231 of the General Laws is hereby amended by in-  
 2 serting after section 85E, as added by chapter 300 of the acts  
 3 of 1959, the following new section:

4 *Section 85F.* In all actions to recover damages for personal  
 5 injury resulting from an accident involving a motor vehicle.  
 6 wherein the plaintiff was a passenger, the plaintiff shall be per-  
 7 mitted to recover upon proof of acts or omissions of the  
 8 operator which constitutes ordinary negligence.

### Good Samaritan Law – Extension To Nurses

HOUSE . . . 1966 . . . No. 2680

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#### AN ACT EXEMPTING NURSES FROM CIVIL LIABILITY AS A RESULT OF RENDERING CERTAIN EMERGENCY CARE

Chapter 112 of the General Laws is hereby amended by striking out section 128, as most recently amended by chapter 557 of the acts of 1965, and inserting in place thereof the following section:—

*Section 128.* No physician duly registered under the provisions of sections two or two A, and no nurse duly registered under the provisions of sections seventy-four, seventy-four A, seventy-four B or seventy-six or resident in an other state, in the District of Columbia or in a province of Canada, and duly registered therein as a physician or nurse who, in good faith, as a volunteer and without fee, renders emergency care treatment, other than in the ordinary course of his practice, shall be liable in a suit for damages as a result of his acts or omissions, nor shall he be liable to a hospital for its expenses if, under such emergency conditions, he orders a person hospitalized or causes his admission.

The proposed amendment extends the so-called “Good Samaritan” Law to nurses who render emergency first aid, care, or treatment other than “in the ordinary course” of their practice.

At present, the “Good Samaritan” law applies to doctors.

In 1966 the General Court inserted the following amendment to Chapter 76 of the General Laws.

*“Section 15A.* No physician or nurse administering immunization or other protective programs in schools under public health programs shall be liable in

a civil suit for damages as a result of any act or omission on his part in carrying out his duties. Approved August 31, 1966”.

Under the present law, nurses do not enjoy immunity from suit if they act in the role of a “Good Samaritan.”

In 1962 the General Court granted immunity from liability to physicians who rendered emergency first aid or other emergency treatment to any person at the scene of a motor vehicle accident. Since that time, doctors from outside the commonwealth were given the same immunity, and most recently the immunity has been extended to cover not only the treatment given at the scene of an accident, but also any “emergency care or treatment other than in the course of” the practice of the physician. In our 40th Report for 1964 at page 67, we recommended extension of the immunity to “public gatherings” but the General Court made the application even more general.

The reason given for this “Good Samaritan” legislation is that a doctor would not render aid for fear he would be sued. Under Chapter 112, Section 12B of the General Laws, now existing, this liability is removed and the doctor therefore could be expected to show a greater willingness to aid. We also note that no immunity is now granted to a medical student who is licensed as an “assistant in medicine” under Chapter 112, §9A.

In the past two or three years there have been proposals to extend the immunity to members of rescue units who hold Red Cross First Aid Certificates and to others. We have opposed such extension because we were unable to determine the qualifications of such persons who are trained by the Red Cross. We might point out that we expect our firefighters and policemen to render emergency medical aid as part of their job although there is no provision for immunity.

This present bill seeks to extend the “Good Samaritan” immunity to registered *professional* nurses and registered *practical* nurses whose qualifications are approved by the Board of Registration in Nursing.

We are satisfied that the education and training of registered *professional* nurses establishes the qualifications they possess, and that if the General Court grants immunity to them, our citizens could expect trained persons to act in emergencies who might now be reluctant due to fear of a lawsuit.

In the case of registered *practical* nurses, we are of the opinion that the Board of Registration should advise the General Court that practical nurses possess or could be expected to possess such qualifications as to warrant an immunity.

If such is the case, we would place them in a category with the registered *professional* nurse for the purposes of Chapter 112, Section 12B.

## Prohibiting Certain Exculpatory Provisions In Contracts For Home Improvement

HOUSE . . . 1966 . . . No. 2358

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AN ACT PROHIBITING CERTAIN EXCULPATORY PROVISIONS IN CONTRACTS FOR THE REPAIR OR IMPROVEMENT OF RESIDENTIAL STRUCTURES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 143 of the General Laws is hereby amended by  
2 adding after section 89, as added by section 1 of Chapter 152  
3 of the acts of 1955, the following new section: —

4 *Section 90.* Any provision in a contract to repair or re-  
5 model a dwelling whereby the contractor seeks by the use  
6 of any words whatsoever to preclude or exonerate himself from  
7 liability to the owner, tenant or any other person for any injury,  
8 loss or damage arising from any omission, fault, negligence or  
9 other misconduct on his part, shall be deemed to be against  
10 public policy and void.

The necessity for legislation such as House 2358 arises from the operations of certain home improvement contractors who have induced unsuspecting property owners to sign written contracts providing that if the contractor is negligent in the course of the work, he will not be subject to a claim by the property owner. Hence, if the contractor in the course of the work should create leaks in the roof or damage the plumbing, the written contract imposes the burden solely on the homeowner. It should be kept in mind that many of these contracts involve promissory notes covering the cost of the work plus carrying charges and interest.

Often the damage is discovered when the homeowner has been making payments on the notes to a bank or a loan company. The

holder of such a note takes it free of any claim that the work was improperly done, and the clause which exonerates the contractor from liability could oblige the owner to pay the notes and also pay for the re-doing of the work in order to correct leaks or other defective conditions.

The proposal of House 2358 of 1966 would make it against public policy for *any* contract to repair or remodel a dwelling to contain a clause exonerating the contractor for injury, loss, or damage resulting from his negligence, omission or misconduct.

We question whether or not it is wise to absolutely prohibit our citizens from entering into such a contract *if the parties understand what they are doing*. The application of the proposed law would apply to all "dwellings" and there are some cases where work might not be undertaken unless an owner assumed the risk. A suburban water district west of Boston will not repair water meters unless the homeowner assumes the risk of replacing any pipes which break during the process. There are many instances where a tradesman will not guarantee the effect of his new work on the existing plumbing, electric wiring, sewage disposal etc. In these circumstances the contractor seeks to avoid any claim and may have a written contract. The parties may wish to contract with each other despite the refusal of the contractor to be responsible.

After due consideration of the problem, we believe that it would not be wise to prohibit all such contracts entirely. We suggest that any language which purports to exclude or exonerate the contractor from any liability in these circumstances should be in large bold face type and that legislation requiring such prominent display should be enacted.

We also recommend to the General Court that other legislation might better protect the public from fly-by-night remodeling contractors who prey on the public. Such contractors could be licensed and could be required to furnish security for the protection of the public in certain instances. Those who buy commercial paper (notes) from such contractors might well be required to take such notes subject to a defense that the work was not performed as agreed, or not performed at all. This innovation would tend to eliminate from the scene those contractors who do not demonstrate to the lending institution that they intend to give value and do the job in a good and workmanlike manner. We definitely recommend to the



General Court that attention be given to the protection of the public in this area.

In regard to the specific matter of H. 2358, we recommend the following:—

## 1967 DRAFT ACT

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1 Chapter 143 of the General Laws is hereby amended by adding  
2 after section 89, as added by section 1 of Chapter 152 of the acts  
3 of 1955, the following new section: —

4 *Section 90.* Any provision in a contract to repair or remodel  
5 a dwelling whereby the contractor seeks by the use of any  
6 words whatsoever to preclude or exonerate himself from liability  
7 to the owner, tenant or any other person for any injury, loss  
8 or damage arising from any omission, fault, negligence or other  
9 misconduct on his part, shall be printed in twelve point bold  
10 face type.

## VI. IMPROVEMENTS IN JUDICIAL ADMINISTRATION

### The Ad Damnum

In actions at law in this Commonwealth the attorney for the plaintiff prepares a writ which has always contained a clause called the Ad Damnum. This sets forth the dollar amount which the plaintiff seeks. Except where the property of the defendant has been attached, the dollar value stated in the writ is considered of little significance. Some attorneys insert the figure of \$10,000 in any motor vehicle case; some pick a figure out of thin air. The court pays no attention to the Ad Damnum in deciding whether or not to transfer a motor vehicle case for trial in a district court. The Ad Damnum may be \$50,000 but unless a statement is filed under Superior Court, Rule 33A which shows damages can be reasonably expected to exceed \$2,000, the case goes to the District Court for trial.

When the jury is empannelled, counsel for the plaintiff may read the writ aloud before the jury. Counsel may therefore represent that a relatively minor matter calls for a huge sum in damages. If there is evidence to show heavy damage, there is no question of propriety in reading a large dollar amount to the jury. Where no evidence has been or is likely to be produced to show heavy damages, the propriety of reading out a purely grotesque and inflated demand is questionable indeed.

We think it is within the power of the trial judge to deny the right of a plaintiff to prejudice the jury by reading an unsubstantiated damage claim for \$100,000 for example where the papers on court show the maximum recovery possible is \$25,000 at best. The courtroom is not a Persian Market where rugs are sold by traders who follow bazaar rituals of the Middle Ages.

Where the plaintiff makes an attachment of a bank account, or of real property, or of some other property, the Ad Damnum is liable to command a little more respect. If counsel for the plaintiff makes an excessive attachment, he may do so at his peril and at the peril of his client. In attachment cases, a bond must be given to release

the plaintiff's attachment. This bond is in the sum of the Ad Damnum unless the court shall reduce that amount after hearing. There is therefore still some sound reason for retaining the Ad Damnum Clause in this Commonwealth until such time as a different method is adopted in cases where an attachment is made.

When no attachment is made, the Ad Damnum Clause is a vestige of days long gone by.

We therefore recommend that if it is determined by the trial justice that the Ad Damnum would tend to confuse or prejudice the jury, directions should be given that no reference be made to the dollar value in the Ad Damnum if the writ is read to the jury. In addition, we recommend that the writ not be sent to the jury where the Ad Damnum would confuse, prejudice or mislead the panel.

If necessary, a rule might be considered to more plainly regulate the abuse of the Ad Damnum, and we strongly recommend the adoption of such a rule.

We also look with approval on the practice of deferring action on last minute motions to increase the Ad Damnum. If the jury verdict warrants the allowance of such a motion, and if it is in the interests of justice, there is ample time to deal with such a motion after the verdict is announced or after the judge (if no jury is involved) has made his findings on the question of damages.

## **Answers To Interrogatories**

In the trial of a case in our state courts, there is often confusion surrounding the written interrogation filed prior to trial. A party who files a set of thirty questions can expect his opponent to file a set of an equal number of answers. If there are several parties, there are several sets of questions and several sets of answers. The judge and the jury are often kept in a state of frustration while counsel try to match questions and answers. The witness who is testifying becomes even more un-nerved by the procedure than is necessary. None of this is the result of a program of a successful trial tactics by the lawyers but it is rather a condition which has been for too long permitted to exist merely for lack of necessary reform. In the Federal Courts and in many jurisdictions, the party making answers is required to first state the question and then give his answer. In most cases, the questions are short and the answers even shorter. For good cause shown, a party might expect to be excused from restating

unduly lengthy questions. It should be kept in mind that either party may submit interrogatories which fact should guarantee that unreasonably lengthy questions would commonly be unknown.

By order of the Superior Court a person who wishes to raise legal arguments concerning interrogatories and their answers is required to first state the question then state the answer, and then state his legal position relative to the question and answer. This procedure is required before the judge will consider or permit oral argument.

We feel that the time has arrived when a rule should be adopted in all of the courts of the Commonwealth requiring that the party making answers to interrogatories shall first state the question, and then the answer unless for good cause shown the court shall order otherwise.

We therefore recommend to each of our courts that the following rule be adopted with variations as may be necessary to fit into the existing rule at the appropriate point.

### **Answers To Interrogatories**

In making answers to interrogatories, the party interrogated shall first state the question and then set forth his answer. For good cause shown, the court may excuse a party interrogated from strict compliance with this rule where the interrogatories are unusually complicated or lengthy.

### **Dismissal Of Old Actions For Want Of Prosecution**

It has been brought to our attention that under the Rules of the Boston Municipal Court a case can remain inactive for as long as twenty years. A case pending in the Boston Municipal Court was marked for trial on April 13, 1966. The Writ was dated July 5, 1946 and was entered in court on July 27, 1946. Further proceedings took place in 1946, but it was not until the expiration of almost twenty years the case was marked for trial.

In another case the Writ was dated August 28, 1956 and was marked for trial May 31, 1966.

It is a miscarriage of justice to permit parties to mark their cases for trial after periods as long as fifteen or twenty years. Defense counsel could not possibly find the witnesses or the evidence after so long a time. In addition, there is the matter of interest at the rate of 6 per cent on a judgment. The interest dates back to the date on the writ.



At present under Rule 43A of the Rules of the Boston Municipal Court, a case can be dismissed by the court after twenty years if no proceedings have been taken within the six preceding years. Rule 43 of the Rules of the Boston Municipal Court permits an action to be dismissed on the written request of a party where no proceedings have been taken for two years or more.

In the Rules of the District Courts, there is a provision which allows cases which have remained on the docket for two years without any action to be dismissed either on motion *or by general order of the court*. Rule 39 of the District Court Rules therefore allows the court to dismiss actions after notice when it appears that the case will no longer be prosecuted.

Rule 85 of the Rules of the Superior Court permits dismissal after three years of civil cases in which no action is indicated. These cases are first marked "inactive" and thenceforth they are dismissed at the end of one year.

Suggestions have been made for legislation which would permit all courts to dismiss cases in which no action has been taken for six years or more. We are of the opinion that it is in the interests of justice that such cases be dismissed.

Rule 43A of the Rules of the Boston Municipal Court now reads as follows:—

"Any case that has been pending in this court for over twenty years in which the parties have never brought proceedings to final judgment as a matter of record and in which no proceedings of any nature have taken place within six years shall be dismissed.

Said dismissal shall have the same effect as an entry of judgment for the defendant and shall be without costs".

We recommend that this Rule be revised as follows: —

### **Revised Rule 43A**

"Any case that has been pending in this court for over six years and which has remained on the docket for six years preceeding without action shown on the docket other than being placed on the trial list, marking for trial, being set down for trial or the filing or withdrawal of an appearance, shall be dismissed.

Said dismissal shall have the effect of a conditional entry of judgment for the defendant.

The Clerk shall give notice of such dismissal to the parties.

At any time before the fourth succeeding Friday after such dismissal is entered on the docket, as above provided in any action so dismissed, the conditional entry of judgment may be vacated upon motion of either party after

notice, and for good cause shown, and upon such terms and other conditions as the court, in its discretion, may impose.

If no action is taken to vacate such conditional entry of judgment, as above provided, a final judgment for the defendant shall be entered on the fourth succeeding Friday after such conditional entry of judgment is made. Such final judgment shall have the same effect as an entry of judgment for the defendant and shall be without costs."

Attention is called to the fact that it would be useful to have legislation which would provide that where the parties abandoned the prosecution of their cases in the courts, such cases should be dismissed automatically after the passage of a certain time period.

## VII. SPECIAL STUDIES

### Validating Certain Acts Of Town Meeting By Secretary Of State

HOUSE . . . 1966 . . . No. 521

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AN ACT AUTHORIZING AND EMPOWERING THE SECRETARY OF STATE TO VALIDATE CERTAIN ACTS OF A TOWN MEETING.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 9 of the General Laws is hereby amended by inserting
- 2 after section 1 thereof, the following section: —
- 3 *Section 1A.* In the event that an act of a town meeting shall
- 4 be determined to be invalid by reason of a procedural defect,
- 5 after its acceptance at a town meeting, then upon application
- 6 of a majority of the board of selectmen, the secretary of state
- 7 may validate such act, subject, however, to the approval of the
- 8 attorney general.

We have made a study of typical legislation which has been enacted by reason of the fact that an act of a town meeting has been determined to be invalid by reason of a procedural defect.

In our study, we have analyzed all of the special acts which were passed in this area in the years 1962, 1963, and 1964.

The type of legislation which is involved here is indicated by the the following bill which was introduced in the 1966 session.

SENATE . . . 1966 . . . No. 848

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AN ACT VALIDATING CERTAIN PROCEEDINGS TAKEN BY THE TOWN OF FALMOUTH AT ITS ANNUAL TOWN MEETING HELD IN THE YEAR NINETEEN HUNDRED AND SIXTY-SIX.

*Be it enacted by the Senate and House of Representatives General Court assembled, and by the authority of the same, as follows: —*

- 1 *Section 1.* So much of the proceedings taken by the town
- 2 of Falmouth at its annual town meeting held in the year nineteen
- 3 hundred and sixty-six as may be deemed to be invalid because
- 4 of the failure to comply fully with the requirements of paragraph

5 (b) of section one of chapter one hundred and one of the town  
6 by-laws relative to posting of the warrant for said meeting are  
7 hereby validated and confirmed.

1 *Section 2.* The vote taken by said town under article sixty-  
2 four of the warrant for said meeting appropriating the sum of  
3 two hundred and fifty thousand dollars to be raised by transfer  
4 from the excess and deficiency account and by borrowing for  
5 constructing a municipal public works garage and storage build-  
6 ing, is hereby validated and confirmed, and the town treasurer,  
7 with the approval of the selectmen, is authorized to issue bonds  
8 or notes of the town in the amount of one hundred and fifty  
9 thousand dollars pursuant to said vote and to chapter forty-four of  
10 the General Laws, notwithstanding the fact that said article  
11 did not refer to the specific means by which said appropriation  
12 was to be raised.

1 *Section 3.* This act shall take effect upon its passage.

This bill was referred to the Committee on Towns and was reported in the Senate on May 25, 1966, ordered to a third reading on May 31st, and passed to be engrossed on June 1. Thereafter, it was cleared through the House and Senate to the Governor on June 9. It was signed into law as Chapter 383 of the Acts of 1966 on June 15, 1966.

If there had been any reason for any citizen of the Town of Falmouth to question the wisdom of such legislation, there would have been ample opportunity between December 5, 1965, which was the closing date for the filing of bills and June 15, 1966, for such citizen to oppose such legislation either personally or through his state senator or representative. The suggestions of S. 848 (1966) would afford no opportunity for such opposition as far as we can tell since all proceedings would not be public.

From the list of special acts which accompanies this report, it is obvious that for the most part the acts of the town meeting were held invalid by reason of the failure either to give a notice as required by law either by posting or publishing; the failure to have a public hearing in connection with changes in zoning by-laws; or the fact that the enabling legislation was not in effect at the time of the town meeting. There are other reasons which necessitated special legislation to validate the action of the Town meeting.

In all cases, there was a violation of either general law, a special statute of limited application, or a town by-law.

The proposed legislation in effect would move in the direction of a government of men and not a government of law.



According to the proposed legislation, the Board of Selectmen and the Secretary of State, with the approval of the Attorney General, would make lawful that which is now unlawful. At the present time, the Great and General Court acting in both branches with the approbation of the Governor may enact curative legislation within constitutional limits. To recommend legislation such as H. 521 of 1966, would invite the executive branch to engage in lawmaking on a level equal to that of the Great and General Court. Were this to come about, either such legislation or the Constitution would have to give way.

Many of the procedural defects in town meetings only became apparent upon the close inspection by bond counsel who must certify as to the legality of the proceedings.

### **Home Rule Amendment**

On November 8, 1966 the "Home Rule" Amendment to the Massachusetts Constitution was ratified by the people. Section 8 of this Amendment prevents the General Court from enacting a special law applicable only to one town. An exception to this is where the special law is requested by the petition of the voters of the town or the town meeting; or by a two-thirds vote of the House and Senate following a recommendation of the Governor.

Because of the "Home Rule" Amendment, it will be difficult to enact special acts to remedy situations where some provision of the General Laws has been violated. What is more disconcerting is the fact that it may require a considerable exertion to obtain the consent of the voters, or the town meeting, to correct a prior error. Presumably a special town meeting would be called to vote to petition the General Court for the special legislation. If the bill were filed by the dead line, two thirds of both branches would probably vote the remedial legislation and the Governor would normally be expected to give it his recommendation and approbation.

This new twist would seem to make it attractive to have the Secretary of State take corrective action rather than set the machinery of the General Court into high gear for the sole purpose of helping the town of Dunstable overcome a failure to post a warrant on the right bulletin board, to give an example.

Against this we must weigh the fact that all towns are creatures of the Great and General Court. The towns and their meetings have only such powers as the people, acting through the General Court,

choose to give or to permit. "Home Rule" cannot change the legal status of the town and the requirement that the General Laws be obeyed. If the provisions of the General Laws are defied, evaded or carelessly neglected we shall have chaos.

Under the Constitution of the Commonwealth it would seem that if a general law has been violated, curative action by the executive branch is undesirable. It is possible that some compromise might be made to the extent that a general law could be enacted permitting the Secretary of State to supervise procedures which, after due notice to interested parties, would validate "technical violations" or "procedural defects." It would seem wise for the General Court to seek the opinion of the Supreme Judicial Court in connection with proposals of this nature.

We do not recommend the bill because of its conflict with the recent constitutional amendment and for the reason that unless the General Court can frame a law which gives intelligible legislative principles to be followed by the executive in validating "procedural defects", it seems to us that the executive is performing legislative functions. As we have these doubts, we refrain from a definite statement that the proposal can form the basis for a practical solution even if its application was greatly restricted to a few common "defects".

# A THREE YEAR SAMPLING OF CURATIVE LEGISLATION RELATIVE TO PARTICULAR TOWNS

1962 - 1964

(This Summary Demonstrates Typical "Procedural Defects" in Town Meetings — 1962-1964)

Year	Name of Town	Chapter of Acts & Resolves	Section	Statutes Violated	Comments on "Procedural Defect" Involved
1962	Amesbury	619	1, 2	Section 13 of Article III of Town By-Laws	Failure of said proposal to be first referred to the planning board of said town.
1962	Milton	447	1, 2	Now Chp. 40A §6 of General Laws	Failure to comply with certain provisions of law relative to notices of hearing on changes in zoning by-laws.
1962	Nahant	448	1, 2	Reason not apparent but action necessary in connection with a bond issue.	
1962	Rockport	53	1, 2	Chp. 40A, §6 of General Laws	No publishing or posting of notice as required by law.
1962	Rutland	173	1, 2	Chp. 40A, §6 of General Laws	No publishing or posting of notice as required by law.
1962	Sudbury	69	1, 2	Chp. 40A, §6 of General Laws	Failure to comply with this statute probably in connection with a public hearing.
1962	Sunderland	33	1, 2	Chp. 40A, §6 of General Laws	No publishing or posting of notice as required by law.
1962	Swampscott	496	1 - 3	Chp. 300, §3 1927	Failure to mail notice of town meeting to town meeting members.

# SPECIAL PROVISIONS RELATIVE TO PARTICULAR TOWNS 1963

Year	Name of Town	Chapter of Acts & Resolves	Section	Statutes Violated	Comments on "Procedural Defect" Involved
1963	Amesbury	428	1 - 3	Chp. 6, §4, Acts of 1953— Limited Town Meeting	Notice of adjourned town meeting had to be published and mailed at least 24 hours before adjourned meeting.
1963	Hadley	831	1 - 3	Chp. 8 — Acts 1963	Chp. 8 did not have the force of law at meeting time.
1963	Hudson	2	1, 2	Chp. 40A, §6, Acts 1963	Failure to comply with certain provisions of law relative to notices of hearing on changes in zoning by-laws.
1963	Ipswich	262	1, 2	§8, Article 3 of Town By- Laws	Vote not passed at a deliberative session.
1963	Ludlow	541	1 - 3	Chp. 336, Acts 1929	Deficiency in giving notice of meeting and in reconsideration of an article in the War- rant.
1963	Natick	98	1, 2	Unknown	The bill concerns reimbursement of ex- penses to a Public Works Department employee injured on job.



# SPECIAL PROVISIONS RELATIVE TO PARTICULAR TOWNS

1964

Year	Name of Town	Chapter of Acts & Resolves	Section	Statutes Violated	Comments on "Procedural Defect" Involved
1964	Andover	36	1, 2	Chp. 330, Acts 1960 Chp. 274, Acts 1961	Members of regional school district planning board were not properly (legally) appointed. Validity of school district was in question.
1964	Arlington	395	1 - 3	No Authority	Enabling statute apparently not in effect at meeting time.
1964	Barnstable	235	1 - 3	No Authority	Enabling statute apparently not in effect at meeting time.
1964	Blackstone	385	1, 2	Subsection D of Section II of Town By-Laws	Failure to Publish Warrant for meeting in newspaper with largest local circulation.
1964	Burlington	565	1, 2	Chp. 39, §9 & 10 of General Laws	Defect in posting or publishing of warrant of town meeting.
1964	Methuen	36	1, 2	Chp. 330, Acts 1960 Chp. 274, Acts 1961	Members of regional school district planning board were not properly (legally) appointed. Validity of school district was in question.
1964	Natick	566	1, 2	Probably Chp. 39 §9 & 10	Defect in posting or publishing of warrant of town meeting.
1964	North Andover	36	1, 2	Chp. 330, Acts 1960 Chp. 274, Acts 1961	Members of regional school district planning board were not properly (legally) appointed. Validity of school district was in question.
1964	Scituate	429	1, 2	Chp. 336, Acts 1957 Chp. 69, Acts 1963	Underlying Statutory Authority did not have the force of the law at the time of the posting of the warrant.
1964	Walpole	569	1, 2	Chp. 645, Acts 1948	Error in statutory reference
1964	Wrentham	2	1 - 3	Chp. 147, §13C of General Laws	Enabling legislation not in force at time of meeting

**ABSENTEE LANDLORDS****HOUSE . . . 1966 . . . No. 1003**

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AN ACT REQUIRING ABSENTEE LANDLORDS TO PROVIDE THE NAME OF A RESIDENT  
AS AGENT FOR SERVICE OF PROCESS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 *Section 1.* Any person owning a tenement within the defi-  
2 nition of section two of chapter one hundred and forty-four of  
3 the General Laws and including tenements within the city of  
4 Boston and including rooming house, who does not reside therein,  
5 shall file in writing with the city or town clerk in the city  
6 or town where any such structure may be found the name and  
7 address of an individual residing in such city or town to be  
8 his true and lawful attorney upon whom all lawful processes in  
9 any action or proceeding against him may be served.

1 *Section 2.* If any person fails to comply with the require-  
2 ments of section one he shall be deemed to have appointed said  
3 city or town clerk as his agent as above, and service upon any  
4 such clerk shall have the same force and effect as service upon  
5 such person's duly constituted appointee.

1 *Section 3.* "Person", as used in sections one and two, shall  
2 include but not be restricted to any individual, or individuals,  
3 as tenants in common, joint tenants, tenants by the entirety or  
4 otherwise; any corporation or business trust; any trustee; any  
5 partnership; any receiver or trustee in bankruptcy; any tenant  
6 having a leasehold interest for a period in excess of ten years;  
7 any mortgagee in possession.

In our 41st Report for 1965, pps. 59-62, we discussed the problems associated with tenement housing conditions where the enforcement officials cannot effectively deliver legal notice to the nonresident owner. The above law was proposed so that effective notice could be given to a resident agent. We said in our 41st Report that in seeking to solve housing problems for those whose economic level forces them into minimum accommodations, we still must respect constitutional principles. One such principle, which seems unlikely to suffer substantial alteration, requires due process to be used when private property is condemned or seized by the authority of the Commonwealth or its political subdivisions.

In 1966, the Special Committee of the General Court on Low

Income Housing made a study of this bill and others which contained similar proposals.

On September 6, 1966, Chapter 707 of the Acts of 1966 was approved. This chapter, in enacting a "Rental Assistance" Program, also amends General Laws (Ter. Ed.) Chapter 144, §95 by requiring that the owner of any tenement or rooming house, who does not reside therein, shall notify the city or town clerk of the name of his agent located in the city or town in which the tenement is located. Such agent can be served with "all lawful processes".

The new §95B reads:

"If any person fails to comply with the requirements of section ninety-five A he shall be deemed to have appointed said city or town clerk as his agent as above, and service upon any such clerk shall have the same force and effect as service upon such person's duly constituted appointee.

When legal process against any such person is served upon such clerk, a copy of said process shall also forthwith be sent by the plaintiff or his attorney to the defendant at his last known address or to the address last listed for the owner of said premises on the assessors list in said city or town.

Such copy shall be sent by registered mail with return receipt requested. The plaintiff's affidavit of compliance herewith, and the defendant's return receipt, if received by the plaintiff, shall be filed in the court where the case is pending or where the service was issued on or before the return day of the process or within such further time as the court may allow."

Unlike the first proposals for legislation in this area such as H. 2322 of 1965, Section 95B of Chapter 144 now calls for the City or Town Clerk to give notice to the owner. This bill and H. 1003 of 1966 failed to provide for notice to the owner.

It would appear from the language of Section 95B that criminal proceedings cannot be initiated by service upon the resident agent. In Boston, Chapter 355 of the Acts of 1960, calls for a \$100 fine for failure to register the agent's name.

Chapter 145 has also been amended by a similar provision which adds to the existing law the requirement for registration of the name of a local agent, and for want thereof the city or town clerk is made the agent of the owner.

Massachusetts now has a law which is far less demanding in respect to the appointment of an agent than Section D26-3.1 et seq. of the Administrative Code of the City of New York.

Having enacted Chapter 707 of 1966, there seems to be no need for the bill referred to us. We therefore do not recommend it. We

do not presume to draw any conclusions about the efficacy of the new "Absentee Landlord" law.

We are informed that the State of New York has enacted Chapter 619 of 1966 amending the New York "Multiple Dwelling Law" which now not only requires the appointment of a local or resident agent but also makes stockholders of a corporate owner liable to the sanctions of the enforcement code if the premises have been declared a public nuisance and no remedial action is taken by the "owner". *Such stockholders (with 10% or more interest) are "jointly and severally liable for all injury to person or property thereafter sustained by any tenant of such multiple dwelling or any other person by reason of the condition constituting such public nuisance and for all costs and disbursements including attorneys fees . . . ."*

## CONSERVATION EASEMENTS 1966 RESOLVES, CHAPTER 4

---

*Resolved*, that the judicial council be requested to investigate the subject matter of current senate documents numbered 360, creating conservation easements, so called, and authorizing the commonwealth and its political subdivisions and political instrumentalities to acquire such easements; 362, authorizing local conservation commissioners to acquire conservation easements; and current house document numbered 1038, to clarify the name in which and manner in which land may be acquired for conservation purposes, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

By Chapter 4 of the Resolves of 1966 the Judicial Council was requested to investigate the matter of "conservation easements"; their creation; their acquisition by cities, towns, and other political subdivisions of the commonwealth or by Municipal Conservation Commissions established under G. L. (Ter. Ed.) Chapter 40 §8C; and the manner in which such interests in land may be acquired.

### Scope Of The Study

Three bills were referred to us for study. This first is Senate No. 360 of 1966 which for the first time gives statutory authority for the creation of a "Conservation Easement", and defines that term.

The second bill is Senate 362 of 1966 which adds to Section 8C of Chapter 40 authority for the local Conservation Commission to



(1) acquire "conservation easements", and (2) to impose *restrictions* on land and its use. This second bill would also eliminate from section 8C of Chapter 40 the words "development right" so that a Conservation Commission could not acquire such a right in the future.

The third bill is House 1038 of 1966. This would make it clear that a Conservation Commission cannot receive interests or rights in land, including "conservation easements" as a *gift* unless the City Council or selectmen approve first. This bill also eliminates the words "development right" which are now in section 8C of Chapter 40.

### **S. 360 CREATION OF CONSERVATION EASEMENTS**

To those who have been accustomed to thinking of an easement only in terms of a right of way or a right to go upon the land of another and enjoy some other limited right, the term "conservation easement" is perhaps misleading. The "conservation easement" precisely as it is described in S. 360 does not now exist. It is to be a right, enforceable by a public body such as a Conservation Commission, to preserve open land or agricultural land in the interests of conservation of the natural resources of the commonwealth even though the land is privately owned.

It is necessary because the law is not now clear on the questions of whether or not a public body may enforce measures which are designed to preserve undeveloped land without actual ownership of the land itself. Generally speaking, the right to enforce easements or restrictions is tied to adjoining lands for the benefit of which the more traditional variety of easements or restrictions were created.

The "conservation easement" has become necessary because cities and towns find it impossible to make outright purchases of land for conservation purposes due to lack of funds. At the same time municipalities may be able to acquire certain rights of control over private land at no cost whatsoever. To make this clear, we might suggest a fictional example of Myles Standish O'Brien who wishes to retain ownership of his six acres of open land in the Town of Codfish yet indicates a willingness to allow certain controls or restrictions to be placed on the future development of his land. To accomplish this purpose, he would be authorized, under Senate No. 360 to give or sell to the Town of Codfish (or its Conservation Commission), by

deed, a "conservation easement" applicable to the entire six acres. The form of a deed might be as follows:

## **FORM OF DEED OR CONSERVATION EASEMENT**

G. L. Chapter 187, §5, (Proposed by S. 360)

I, Myles Standish O'Brien of the Town of Codfish in the County of Barn-tucket, for consideration paid, give, grant, release and dedicate to the Town of Codfish a CONSERVATION EASEMENT, all as more specifically herein-after set forth, in a certain parcel of land situated in said Town and County and bounded and described as follows:

Northerly by Massachusetts Bay 600 feet;  
Easterly by Clam Road, a public way 400 feet;  
Southerly by Route 945, a county highway 600 feet; and  
Westerly by land of Wetland River 400 feet.

Hereby granting to said Town of Codfish, for the purposes of preserving the said above described parcel in the same condition as now existing, the right and easement to restrict the use of said land so that no building or fence will be erected thereon, other than the residence and barn, and outbuildings now existing or the replacements thereof, if said buildings are destroyed or become no longer useful or habitable; and so that no trees, shrubs or other greenery thereon shall be removed or destroyed; and so that said described premises will be used only for agriculture, farming or as a residence to an extent not greater than that existing on the date hereof.

The rights herein conveyed and dedicated are for the promotion and develop-ment of the natural resources and for the protection of the watershed resources of the Town of Codfish under Chapter 187, Section 5 and Chapter 40, Section 8C as it may be amended; to be managed, controlled and enforced by said Town by its Conservation Commission in accordance with Chapter 40, Section 8C.

### **Optional Grant Of Rights**

And I do hereby grant to the inhabitants of the Town of Codfish the right to pass and repass over trails and pathways now or hereafter laid out over the premises above described for the purpose of fishing, hunting, hiking or nature study, so long as said Town (or said Conservation Commission) shall enforce reasonable regulations established and amended by it to prevent injury to animals, crops, trees, and to prevent nuisance, violations of law. This grant shall be null and void if said Town shall fail to enforce such rules and regulations after an affidavit setting forth such failure shall have been recorded in the Registry of Deeds of the County of Barntucket.

This CONSERVATION EASEMENT shall bind me, my heirs, administra-tors, executors and assigns.

All rights not expressly granted herein are reserved to the grantor.

In witness whereof I have hereunto set my hand and seal on this 3rd day of February, 1967.

MYLES STANDISH O'BRIEN

The foregoing rough sample of a "conservation easement" is an interest in land which would be created under Senate No. 360 of 1966. It is obvious that the proposed legislation covers a situation where the owner would remain as a resident but would give up his rights to develop the six acres. If the land were sold, the buyer could not develop the land with such a conservation easement in force.

If the town had a Conservation Commission, it could, with the consent of the Selectmen, hold the conservation easement under the authority of Chapter 40, §8C. If there was no such commission, the city or town could hold the conservation easement in its own name.

In the above sample deed, the grant of rights to the inhabitants of the town or even a grant to the general public, is not required either under present law, or under the proposed changes in the law. In some cases it would not be practical.

There are many different "conservation easement" possibilities and the law would be flexible enough to fit the needs of a specific situation. Nothing in the law establishes any term for the existence of any conservation easement or for any other interest in land. This is a matter which is beyond the scope of this particular bill. Under the proposed legislation such rights could be made temporary or perpetual. In most cases, it would be a matter for negotiation between a Conservation Commission and a land owner.

State and Federal funds are now available to local conservation commissions for acquisition of such easements or restrictions, and since 1965 the power of eminent domain may be used for their acquisition by cities or towns having such commissions.

More than 2/3 of the commonwealth's cities and towns now have such commissions, all organized within the last 8 years, and most of them within the last 3 years, spurred by the availability of government funds and by an active Association of Conservation Commissions having 1400 members. By July, 1966, reports from 124 commissions disclosed that 74 had by then acquired fee or "easement" interests in about 6850 acres, in parcels varying from less than an acre to 1300 acres.

We think it is necessary to emphasize that under Section 8C of Chapter 40 a city or town is now authorized to take by eminent domain, under the provisions of Chapter 79 of the General Laws, "the fee or any lesser interest" in any land or waters located within the city or town if such is necessary for "the promotion and develop-

ment of the natural resources and for the protection of the watershed resources of said city or town". Under this authority, a "conservation easement" might well be acquired by the power of eminent domain, provided that the city council, or a two-thirds vote of a town meeting was obtained. Thus, it will be possible to permit a landowner to live upon and use his land yet prohibit its further development. This could not be done without payment of "just compensation" in one form or another.

Some lawyers who have dealt with the problems of conservation commissions are presently of the opinion that Chapter 40, Section 8C and the Common Law now permit "conservation easements" although not under that name. These lawyers would nevertheless welcome a new statute which would give clarification in this area. Grants of "easements" and the acquisition of "easements" are now authorized in connection with conservation, but it is the general feeling that the term "conservation easement" is a more elastic concept.

The "Coastal Wetlands" Law (Chapter 130, §105), the "Hatch Act" (Chapter 131, §117C) and the "Coastal Marshes" law (Chapter 130, §27A) are instances where land in private ownership is held under some form of public control as open land for conservation purposes.

To settle any uncertainties in this area of the law, and to definitely establish and create "conservation easements" by a specific statute, we recommend the enactment of Senate No. 360 of 1966. We are of the opinion that this statute will also clearly authorize the enforcement of such "conservation easements" even though the town may not be the owner of the land.

We recommend the following:

## 1967 DRAFT ACT

(Senate No. 360)

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1 Chapter 187 of the General Laws is hereby amended by  
2 adding the following section: —

3 *Section 5.* The commonwealth and any political subdivision  
4 or public instrumentality thereof may hold and enforce a  
5 conservation easement in respect of any land with respect to



6 which a conservation easement for its benefit is purported to  
7 be created by any deed, will, lease, order of taking or other  
8 instrument. The words "conservation easement" as used herein  
9 and in any instrument purporting to create a conservation easement  
10 shall mean the aggregate of rights concerning land in respect  
11 of which a conservation easement is purported to be created  
12 which are stated in said instrument and which are appropriate  
13 to preserve such land in its natural condition or as used for  
14 farming or agricultural purposes. Said rights may include, but  
15 need not be limited to, the rights to require (a) that no build-  
16 ing, road, utility or other structure be constructed or erected  
17 on, over or in such land, (b) that no trash, waste or unsightly  
18 or offensive material be placed or dumped thereon, (c) that no  
19 outdoor advertising be conducted thereon, (d) that no trees, shrubs  
20 or other greenery thereon be removed or destroyed, (e) that no  
21 loam, peat, gravel, soil or other mineral substance be excavated  
22 or removed therefrom, (f) that such land be used only for  
23 farming, agricultural or recreational purposes or be permitted to  
24 remain in its natural condition, (g) that no change be made  
25 thereon which is detrimental to existing drainage, flood con-  
26 trol, water conservation, erosion control or soil conservation,  
27 or (h) that no strip or waste be committed thereon. No such  
28 right shall however be enforced or declared to be enforceable  
29 in any proceeding unless it is determined in such proceeding  
30 that such right is at the time of the proceeding appropriate to  
31 preserve the land subject to such right in its natural condition  
32 or as used for farming or agricultural purposes. A conserva-  
33 tion easement shall be enforceable, however, to the extent of  
34 any other right or rights comprising the same notwithstanding  
35 that enforcement of certain right or rights is denied. A con-  
36 servation easement shall for all purposes be a right in land which  
37 constitutes an easement and shall run with the land subject  
38 thereto forever or for such lesser time as is stated in the  
39 instrument creating the same, except to the extent that said  
40 conservation easement is sooner released in whole or in part  
41 by said public body and except to the extent that enforcement  
42 is denied in any proceeding as above provided. A conservation  
43 easement shall be enforceable only by the public body or bodies  
44 for whose benefit it is stated to be created in the instrument  
45 creating the same, and shall be enforceable without regard to  
46 whether said public body owns other land which is benefited  
47 by its enforcement. A conservation easement shall not be deemed  
48 a restriction within the meaning of chapter one hundred and  
49 eighty-four. No conservation easement shall be created by pre-  
50 scription, custom or adverse use or enjoyment.

## **ACQUISITION OF CONSERVATION EASEMENTS BY MUNICIPAL CONSERVATION COMMISSIONS**

The second bill is Senate 362 of 1966. This legislative proposal is consistent with the enactment of Senate 360 of 1966 in that it provides that a city or town conservation commission may acquire a "conservation easement" of the species created by Senate 360. It is therefore necessary to add "conservation easements" to the list of interests in land which a conservation commission may hold under Section 8C of Chapter 40.

Under Chapter 187, Section 5 as proposed by Senate 360, "the commonwealth and any political subdivision or public instrumentality may hold and enforce a conservation easement". A municipal conservation commission therefore would probably not be authorized to hold and enforce such an easement unless Chapter 40, Section 8C was amended to allow this. We recommend that the Conservation Commission be given such authority.

In Senate 362 it is proposed to eliminate the words "development right" from Section 8C of Chapter 40. We think this is a very sound proposal. There is no real definition of "development right" except that it is the right to develop the land. We find that conservationists have been using the term "conservation easement" interchangeably with the words "development right". To avoid confusion, we recommend that the words "development right" be stricken.

### **Imposition Of "Restrictions"**

Senate 362 also amends Chapter 40, Section 8C by adding the word "restrictions" to the list of interests in land which a conservation commission is permitted to acquire. We do not know whether this suggestion was due to an excess of caution or not. We cannot see that there is great harm in the amendment. It may give a sense of security to those who find it difficult to decide whether or not a conservation easement is an easement or a restriction. For this reason, and to cover an area where there seems to be real concern, we are willing to concur in the proposal. We think the General Court can authorize the creation of a new form of "easement" if this seems desirable.

### **Necessity For Prior Approval For Acquisition**

The third bill is House No. 1038 of 1966. The purpose of this bill, as outlined to us, was to clarify what is represented as a legisla-

live oversight. We can appreciate the problem but must question whether or not more is involved. According to Section 8C of Chapter 40, a Conservation Commission is permitted to receive gifts of property, both real and personal in the name of the city or town, subject to the approval of the city council or the selectmen. Such property is to be held in the name of the city or town.

By Chapter 258 of the Acts of 1961, a Conservation Commission was later authorized to acquire land *and interests in land* (which do not amount to outright ownership) by “gift, purchase, grant, bequest, devise, lease or otherwise . . . ”

It appears to be the position of the Massachusetts Association of Conservation Commissions that acquisitions of land and interests in land by a conservation commission must have the prior approval of the city council or board of selectmen. We are informed that because of the uncertainty existing, House 1038 of 1966 was filed for the purpose of making it clear that prior approval would be necessary for a “gift” and that in all events the title to the land or to a right or interest in the land would be held in the name of the city or town and not in the name of the conservation commission.

We do not think that House 1038 of 1966 either corrects the oversight, or removes the doubt. As a matter of policy, it is probably best to have the city council or the town give prior approval not only for a gift but for *any* acquisition of land or of an interest in land.

We do not recommend House 1038 of 1966 for the above reasons.

If the General Court wishes to insure that there is prior approval for the acquisition of all land and interests in land by a conservation commission, we would recommend the following:

## 1967 DRAFT ACT

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1 Section 8C of Chapter 40 of the General Laws is hereby  
2 amended by striking out the thirteenth sentence and inserting in  
3 place thereof the following sentence: — Said commission may  
4 acquire by purchase, gift, grant, bequest, devise, lease, or other-  
5 wise the fee in such land or water rights, or any lesser interest,  
6 easement, restriction, conservation easement, covenant, or other  
7 contractual right including conveyances on conditions or with  
8 limitations or revisions, as may be necessary to acquire, maintain,

9 improve, protect, limit the future use of or otherwise conserve  
10 and properly utilize open spaces and other land and water areas  
11 within its city or town, and shall manage and control the same.  
12 Any acquisition of the fee in land or any rights or lesser interests  
13 therein including restrictions and conservation easements, and any  
14 covenants or contractual rights shall be in the name of the city  
15 or town and all such acquisitions shall be subject to the prior  
16 approval of the city council in a city, or the selectmen in a town.

## SEPARATE OPINION OF THE CHAIRMAN, FREDERIC J. MULDOON

*A Proposed Draft Act Appears At Page 109*

I agree with much of what the other members of the Council have said, and recognize the needs for a more effective program to conserve our open land and water resources, and the relative economy of achieving such ends through acquisition of restrictive rights rather than fee interests. But I am disturbed by the possibilities of undue private advantage in such arrangements if not made pursuant to a program carefully and objectively worked out in advance, by the unnecessary confusion the "easement" concept and special treatment for it would cause in other fields of public and semi-public use of restrictions, and by the long term damage to our whole recording and title searching system if some means is not adopted to assure that these rights, not apparent from anything on the ground, can be readily found by title examiners in the future without having to search the grantee-grantor indices for every title back to when such rights first started to be used, no matter how much time may by then have elapsed.

I do not see how these problems can be met except by legislation of considerably broader scope than that recommended by the other members of the council — legislation such as has been worked out since the last meeting of the council for the year, and is set forth at the end of my opinion.

### The Constitutional Provision

The "Conservation Amendment" to the Massachusetts constitution, ratified November 5, 1918, reads:

"Article XLIX. The conservation, development and utilization of the agricultural, mineral, forest, water, and other natural resources of the commonwealth are public uses, and the general court shall have power to provide for



the taking upon payment of just compensation therefor, of lands and easements or interests therein, including water and mineral rights, for the purpose of securing and promoting the proper conservation, development, utilization and control thereof and to enact legislation necessary or expedient therefor".

This established that not only "conservation" but also "development" and "utilization" are "public uses" and not just "of public interest" as originally proposed.

The 1917 constitutional convention that adopted this was less than ten years after President Theodore Roosevelt called the first National Conservation Conference. The debate then shows clearly the intention that the legislature be authorized to "compel the development" not only of "broad tracts of waste land" but of other lands as well. ". . . many very large tracts of land in the western part of this State, in the Berkshire district, some of them to the extent of twenty thousand acres, have been bought up by wealthy people, not resident of this State, for game preserves and other purposes. They have bought up hundreds of smaller farms that were engaged in the occupation of producing foodstuffs for our people and they have wiped out those farms that they might have these large estates in the Berkshires and invite their friends to them; and the non-productiveness of those tracts has been paid for by all the people of the State . . . no man shall conserve any large tract of land so that it may be easy for him to shoot game birds or to fish in its streams without molestation or interference." <sup>(1)</sup>

Fear was expressed of "seeing men placed, by virtue of the ownership of certain property in a position that authorizes them to prey upon the community, using that property only for their own selfish ends, neglecting entirely the proper development of the community and the needs of the community and feeling themselves free to use it or let it go to waste as they see fit". <sup>(2)</sup>

Indiscriminate use of conservation restrictive rights, particularly for properties with or near dwellings, while leaving owners in exclusive possession and use, with all the resulting amenities, might create and perpetuate conditions it was a purpose of the amendment to prevent.

The professed object of the "conservation easement" is to keep the restricted areas open not just for a period of years, but as per-

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<sup>1</sup> Ralph Sherman Bauer, Delegate from Lynn, then President of Lynn Board of Trade, and active in Boston Chamber of Commerce.

<sup>(2)</sup> Clarence Hobbs, Jr., Delegate from Worcester, in winding up the debate.

manently as possible, regardless of other future needs. This alone should cause more than usual caution.

## **The Need for State and Local Balance in an Open Land Reservation Program**

Use of the restrictive rights for conservation should be coupled with every reasonable assurance of objectivity — of balancing the demands for living space in expanding metropolitan areas with the needs for “open space” to make cities livable — a difficult task at best, and particularly so for local commissions on the urban fringes.

The Special Non-Legislative Commission whose report is House No. 3769 of 1966, composed of state and charitable agency representatives most concerned with land conservation development and taxation, <sup>(3)</sup> made more intensive study of this conflict of public purposes than could our Council. Its assigned subject was taxation of open space land, and its recommendations were for a program to encourage retention of farms, forests and open space land by joint state and local designations of eligible open areas and offering an 80% abatement of real estate taxes in exchange for a grant of such rights as would prevent development or use of such areas for industrial, commercial or residential purposes for twenty years only. Its statement of the problem and four of its key findings are so pertinent that I quote them:

### *The Problem*

The problem presented to the Special Commission for investigation and study is how to prevent the pressure of annual real estate taxes from forcing the urban development of those farms, forest and other open spaces which it is in the public interest to retain as open land.

The present taxation practices in Massachusetts put great pressure on the owners of farms, forest lands and open spaces — particularly in the vicinity of our cities — for the urban development or other intensive use of these properties. Many of these properties are shown on plans of the State and Municipalities as most appropriately reserved as open land by reason of their value for conservation, outdoor recreation, agriculture, forestry, water supply and to give shape and organization to our growing urban areas.

This conflict of public purposes appears certain to increase in intensity during the coming years.

1. Housing and municipal facilities will require at least double the present urban area in the Commonwealth before the year 2000 to accommodate the

(3) The Commissioners of Commerce and Development, Agriculture, Natural Resources, and Corporations and Taxation, and Representatives of the Massachusetts Forest & Park Association, Farm Bureau Federation, Inc., and Federation of Taxpayers Associations, Inc.

"population explosion" and the world-wide movement of people to metropolitan areas.

2. Those living in these added urban areas will need access to open lands for outdoor recreation in amounts more than doubling the present "open spaces" in and around our Metropolitan centers. For example, the recent study by the Metropolitan Area Planning Council found that the Greater Boston Area's existing 40,000 acres of regional recreation land was deficient by 28,000 acres in 1960 and will be deficient by 110,000 acres by the year 2000.

3. Tax revenues — from one source or another — must be available for provision, operation and maintenance of municipal facilities, — such as schools, streets and highways, mass transit, water and sewer systems, waste disposal, recreation areas, police and fire protection, — in both existing and future urban areas.

4. The planning of future urban growth and of facilities to serve urban populations requires public action to guide and direct development in ways which will provide for the "good life", needs and service of the people. There must be some assurance as to the shape and intensity of urban development for the efficient provision of transportation, education, water and sewer and similar investments in public facilities. To provide that assurance, ways must be found to designate areas where development will be encouraged and areas which should be retained predominantly in their natural state. Furthermore, the decisions made today must not prevent our successors from revising and adapting plans to meet new conditions and opportunities. Retention of open lands will provide needed flexibility for the future.

5. The tools available to our public agencies — Federal, State and Local — for preservation of open land — consist of public ownership in fee or in easements, rights or special interests, and of regulation, as in zoning, under the police power.

(a) Regulation of land use and development under the Police Power — "for the protection of the health, safety, morals and general welfare" is subject to change by legislative action and to interpretation by the Courts as to its reasonableness and validity. The pressure of taxes also works to relax zoning requirements to permit more intensive (and more profitable) uses of the land. Zoning, by itself and unsupported by other programs, provides insufficient "assurance" for planning and public investment.

(b) Public or semi-public (tax exempt) ownership of *all* lands which are needed to be retained for shaping and servicing urban areas is obviously impractical by reason of the costs of acquisition and operation, the huge areas which would then be totally exempt from property taxes, and because of the policies involved. Perhaps, the acquisition of Rights-in-Land, Conservation Easements, and Special Interests in Land can be expanded to cover part of the requirements for open land.

(c) Taxes have been proposed as a tool for preservation of open land. Since the "power to tax is the power to destroy" open spaces, that power can also produce counter pressures which may preserve open spaces.

6. The uses made of open land in the vicinity of cities — for farming, forestry, outdoor recreation and protection of water supplies, etc. have positive values for the community. Many of these lands offer opportunities for "exertive" or "recep-

tive" outdoor recreation with places to play golf, to ride a horse, to picnic or to walk or swim. The wetlands provide natural storage of flood waters and the habitat for birds and wild life. Farming and forestry make constructive and income-producing use of lands retained as open space.

There is a growing appreciation throughout the country for the value of landscape scenery and natural beauty. By any of the so-called "standards" developed by the Federal Outdoor Recreation Resources Review Commission and State Reports, Massachusetts is seriously deficient in lands for outdoor recreation.

### *Findings*

After investigation and study of these problems and previous proposals — The Special Commission found that:

1. It is in the public interest to encourage the reservation of designated areas of farm land, forest land and open space land in their natural or open state by reason of their value for conservation, recreation, agriculture, forestry, water supply and for municipal, regional and state planning.

2. It is in the public interest to prevent the forced conversion of farm land, forest and, open space land to more intensive uses as the result of economic pressures caused by property taxation incompatible with their preservation as "open land" when such lands are so designated by an appropriate state agency (Open Lands Commission) and approved by the municipality in which they are located.

\* \* \* \*

4. Since the retention of "open lands" for various public purposes involves plans and policies for land use and development by individual municipalities, groups of municipalities, regions, and the State, a State Commission, working in consultation with state agencies and regional, municipal and private interests, should "designate" areas as "Open Lands".

5. Since the individual municipality in which any designated "Open Lands" may be located has a special interest and concern with the plans for the future of the community and with tax income from real properties, any and every designation of areas as "Open Lands" should be subject to approval by the municipality.

An additional finding recognized that changing times and conditions require procedures to adjust commitments, and that both the municipality and the owner should be able to "declassify the land under appropriate conditions," including payment sufficient to compensate the municipality and dissuade short-term commitments.

Since this Special Commission, representing the various public interests involved, recommended a Massachusetts open lands commission to "designate", with approval of each city and town, the land and water areas to be retained predominantly in a natural or open state, where owners might voluntarily apply for the 20-year 80% tax abatement, I feel that the protection of such a commission



and its review is also needed where permanent rights and use of eminent domain may follow. Therefore, I include in the legislation I — recommend, the provisions they recommended for such an open lands commission and such designations (Section 1 of my Draft Act), but in order that the problems of arriving at a community-wide plan for designations not unduly restrict the program, particularly in the early stages, I would also permit acquisition of restrictive rights, even if not in a designated area, if similarly approved (Section 2 of my Draft Act, which also adopts most of the changes from H. 1038 suggested by the other Council members). The rule-making power of the open lands commission should be sufficient assurance against use of this alternative as a substitutive for adequate planning or periodic reappraisal of plans.

Although not recognized expressly by the Special Commission's report, the acquisition of permanent conservation rights might well reduce taxes in many instances sufficiently to induce the granting of the rights. Any sale for taxes would have to be subject to the restrictive rights under G. L. Ch. 60, s. 45, and the taxpayer would be entitled to valuation accordingly. Proper state regulations might help assure appropriate reflection in assessments. The particular restrictive rights should be drafted in each instance to apply to the particular characteristics of the parcel and the particular features of it needing to be conserved, thus minimizing costs both in initial acquisition and in future reduction of taxes. It is possible that judicious use of such a flexible tool could, in the long run, increase taxable values, even of subject lands. The reflection in land taxes should be less arbitrary than flat abatements for a period, and less subject to question under our constitutional mandate of equality in taxation.

Also not expressly recognized by the Special Commission are the problems raised by local zoning when it attempts to achieve legitimate conservation ends "by a shorter cut than the constitutional way of paying for the desired improvement". "Flood plan districts" are increasing, and even "watershed protection districts" extending fixed distances beyond water lines, wherein use except in a natural state, and practically all building, are forbidden. It is hard to tell whether distinctions are being made as to the kinds of lands affected, — whether or not meeting safety and health standards or readily improveable thereto, and whether or not already lotted for development or having prime value therefor. These districts may well carry the "police power" to extreme, and in some instances beyond. The courts

are becoming increasingly concerned as to deprivations of reasonable use, and for every instance stricken, scores have succeeded for lack of willingness of owners to challenge authority and undergo the expenses and risks entailed. Purchase of needed rights might, in many instances, be fairer, and a program for such purchases should help relieve pressures to carry zoning too far.

If the Special Commission's recommended tax abatements are authorized, the "designations" could serve the purposes of that program as well, and the rule-making power should be sufficient to avoid possible conflicts between programs.

Open lands commission approvals should not prove inappropriate or unduly burdensome since state and federal funds are the major support for acquisition of restrictive rights and require state review in any case, and such funds can, in the long run, thus be best assured. The approvals, both of designation or acquisition, and of release, should help relieve both local commissions and the state agencies of possible undue pressures and risks.

Two of the principal shortcomings of zoning now increasingly recognized, in addition to its tendency toward deprivation of rights without compensation, are lack of sufficient comprehensive advance planning and lack of sufficient consideration of regional and state-wide needs. Conservation commission activities are expanding more rapidly than has zoning at any time. These approval procedures should give reasonable assurance against development of similar shortcomings. Few communities could alone command as expert assistance in planning as could the state commission. All should be more equally and economically served by the more consistent and objective treatment it can provide. Implementation of the program would always be in local hands, where it should be.

### **Growing Use of Recorded Restrictions by Public Bodies and Charitable Organizations**

The rapid growth of Conservation Commissions and their activities, since first authorized in 1957, is noted in the report of the other members of the Council. Of perhaps 2,000 acquisitions by such commissions, it is estimated that so far not over 100, and perhaps not over 50, have been of restrictive rights, and that these were mostly in form similar to the ones set out there, and also recommended in the Handbook of the Association of Conservation Com-

missions, prepared by its Secretary and Treasurer, Stuart DeBard, Esquire. It is unlikely that any conservation easements or restrictions have yet been taken by eminent domain under last year's authority.

There may now be as many as 40 land conservation trusts, or similar organizations in the state, organized as charities for conservation purposes, mostly within the last decade. Although their acquisitions have been mostly in fee, there have been many instances of their acquiring restrictions by recorded agreement or covenant of owners, rather than grant of "easement". The Commissioner of Natural Resources was authorized by Ch. 579 of the Acts of 1961, to acquire 1,000 acres of flood plain marsh along the Sudbury River in Concord and Lincoln, but forbidden to do so for one year, or if theretofore encumbered by restrictive agreement with the Concord or Lincoln land conservation trust or the town, limiting uses to such as would so far as possible preserve the marsh in its natural state. Numerous restrictive agreements resulted. It is possible that there are as many, or more, instances of restrictive rights held by charitable organizations under covenants or agreements by owners as there are held by conservation commissions under grant of "easement".

The last decade has also seen remarkable growth in activities for preservation of buildings and sites of historical significance. Constitutional Amendment XI, added at the same time as Conservation Amendment, declared preservation and maintenance of property of historical interest a public use, and authorized takings of such property or any interest therein as the General Court may prescribe. Historic districts, starting in 1956 with Beacon Hill and Nantucket, whose special acts were approved by the Supreme Judicial Court, have spread to at least 13 communities, including four under Chapter 40-C, the 1960 general enabling act.

Numerous city and town historical commissions, organized under Section 8-D of Chapter 40, enacted in 1963, have authority to acquire, other than by eminent domain, "the fee or lesser interest in" real property of significant historical value. The Massachusetts Historical Commission, organized under the same Act, has various advisory powers, and the State Secretary may, on behalf of the Commonwealth, for the purposes of the Act, "accept gifts of real and personal property", which can be construed to include restrictive rights.

There is growing realization that historical preservation needs cannot be adequately met by public or charitable ownership alone, or by operation of museums, and that acquisition of restrictive rights against alteration of historically significant features can often be sufficient. There have been several instances of covenants or agreements by owners imposing such restrictions for the benefit of charitable preservation organizations. There have been Heritage Trusts established in Ipswich, Cambridge and Plymouth, with powers to acquire, move if necessary, restore and resell, subject to preservation restrictions, buildings historically significant for their architecture or association, and the Internal Revenue Service has, by exemption letters, recognized such purposes and activities as charitable if properly conducted.

Federal legislation, effective since the last adjournment of Congress, inaugurates new programs of aid to historical preservation, and the Legislative Research Council reported last year on a Preservation Program for Cities and Towns (Senate 691 of 1966).

Acquisition of restrictive rights, rather than fee simple interests, whenever they will sufficiently serve the purposes, is now widely recommended by leaders in the conservation and preservation movements, both in this state and over the country, both for public bodies and for charitable organizations.<sup>(4)</sup>

The acquisition of such rights by both public bodies and charitable organizations has been considerably encouraged by the Internal Revenue Service by Revenue Ruling 64-205 (April 10, 1964) holding that a deed of gift to the United States, whereby the owner agreed to specified restrictions on his land as to buildings, uses, tree removals, dumping, signs, etc., were a deductible charitable contribution to the extent of the fair market value of the restrictive rights or "scenic easement", and by an August 5, 1966 Ruling applying this to gifts to exempt organizations as well as to the United States, and by the "Heritage Trust" exemption letters referred to above.

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(4) See *Securing Open Space for Urban America: Conservation Easements* (1958), by William H. Whyte, Jr., Urban Land Institute Technical Bulletin No. 36.

*Planning for Preservation* (Nov. 1964) by Robert L. Montague, III, former assistant Attorney General of Kentucky, and Tony P. Wrenn, formerly Archivist, National Trust for Historic Preservation, recently appointed to the staff of the Massachusetts Historical Commission.

*Preservation of Open Space Areas: A Study of the Non-Governmental Role* (July 1966) by Prof. Allison Dunham, University of Chicago Law School; Executive Director, National Conference of Commissioners on Uniform State Laws.



The British National Trust for Places of Historic Interest or Natural Beauty was authorized by Parliament in 1937 to accept restrictive covenants, notwithstanding it may not own adjacent land, and its annual reports of acquisitions show these to be now a major part of its program.

There has been enough experience now with use of restrictive rights for conservation and preservation (as well as experience with similar parkway or highway "scenic easements" by the National Park Service and the State of Wisconsin) to show that they fill a real need, and will continue to be sought.

### **The Present Doubts and Statutory Shortcomings**

Wider use of such rights has been limited principally by doubts as to their enforceability at common law on account of ancient rules of privity of estate or contract, benefitted land and non-assignability (which doubts have not deterred the lawyers advising Massachusetts Conservation Commissions and charitable organizations in the instances above referred to, and may be more justified in other jurisdictions), and by probable application of three provisions of General Laws Chapter 184, namely, the section 23 requirement of specified time limit in order to avoid automatic termination in 30 years, the section 26 to 29 requirements for recording of notices every thirty years, and the section 30 requirement of actual and substantial interest. Section 23 can be avoided by specifying a fixed period of years. Sections 26 to 29 can be met by recording the required notices, and the Conservation Commission Handbook advises of the need for such recordings even in the case of conservation "easements". There is reason to think that courts would recognize the substantiality of interest of public body or charity except in cases of change of circumstance such as detailed. Regardless of any technical rules, recording of such a document purporting to create restrictive rights effectively clouds the title.

To lay at rest the common law doubts and make these chapter 184 sections inapplicable is the professed main purpose of the proponents of S. 360. The old common law rules, evolved independently of a recording system such as we now rely upon, and before such restrictive rights were needed, no longer serve sufficient public interest to deserve continuation here and should be laid at rest. The statutory sections were drawn before the needs for restrictive rights became

apparent, and are not appropriate in some respects when applied to them, and need revision accordingly. These aims can be accomplished better by amendments to chapter 184, appropriate for all such restrictive rights, both present and future, such as made by sections 3 to 7 of my recommended draft, than by adding the novel concept of "conservation easement" alone to chapter 187, and impliedly condemning all other restrictive rights of like nature, and raising new conveyancing difficulties.

### **Avoiding the Unnecessary Confusion of the "Easement" Concept**

An easement is most commonly understood to be a right to use another's land, as for passage or maintenance of service lines, or other physical acts — a right which, if continued for twenty years, might, under Chap 187, be acquired by prescription.

The terms "conservation easement" and "development right" derive from popular literature, and have not been subject to judicial scrutiny in Massachusetts. The eight examples given in S. 360 are all what have been for many years known to lawyers and judges as "restrictions". If the word "easement" was omitted from the quoted deed form, the rights created would most naturally be called "restrictions". Use of the term "easement" is apparently intended to gain escape from the time and other limits on restrictions, and to gain acceptance for takings by equation with rights of way. Although such an "easement" would be similar to the one "negative easement" recognized by the Restatement of the Law of Property, namely, an easement of light and air, acquisition of which by prescription is forbidden by G. L. Ch. 187, s. 1, and could be created by statute, it should be less confusing for the future under our statutes and cases to define the rights as "conservation restrictions" and "preservation restrictions" in Ch. 184, as done by my proposed s. 32, and provide expressly for their protection.

### **Laying at Rest the Common Law Doubts**

Protection against the common law doubts should be given for any such restrictive right whether named easement, covenant or restriction, and for all easements, covenants and restrictions held by public bodies, which would include also those used in connection with urban renewal and with changes in zoning or subdivision control

("contract zoning") such as upheld in *Sylvania Electric Products, Inc. v. Newton*, 344 Mass. 428. The doubts need to be resolved for charitable organizations' use of conservation and preservation restrictions as well, for they can reduce substantially the needs for commitment of public funds, and for continuing public supervision and policing. Risks of adverse effects of undue proliferation of such restrictions by charities can be minimized by the proposed requirements of approval by the state and local commissions.

The added sections 31 and 32 for Ch. 184 so provide. An amendment (by section 5 of my recommended act) to section 27 of Ch. 184, would recognize the possibility of a successor to a benefitted party being entitled to enforce the restriction, and would protect the rights in case of dissolution of the charity and transfer to another or to a public body. The Internal Revenue Service now stresses in its testing of charities their provisions for continued devotion of their property to their charitable purposes in case of their own termination.

### **The "Unlimited Time" and "Substantial Interest" Changes**

*Flynn v. Caplan*, 234 Mass. 516, (1919), held that s. 23 terminated a restriction imposed on land adjoining a parkway by a deed to the City of Boston and recognized that public ownership of restrictive rights does not exempt them from the statute. However, the needs for protecting public and semi-public restrictions seem to me sufficient to justify now ending for them both this requirement and that of "substantive interest," so long as there are provisions adequate to assure that reasonable record title search will disclose the interest held, and that there is an adequate release or termination procedure when public need for the interest ceases. My recommended sections 3 and 6 would except such interests. Sufficient release procedure is provided in the recommended section 32, and sufficient record notice provision by the public restriction tract indexing recommended by section 33 and continuation of the notice recording requirement if section 33 is not followed.

### **Public Restriction Tract Indexing as an Alternative to Recording Notices of Restriction**

Our reports over the last dozen years have recommended a series of acts that have been enacted to improve our land title recording system and meet the urgent public need both for greater reliability

of records and for shorter safe periods of search — acts limiting obsolete revesters, rights of entry and leases, formal defects, obsolete mortgages, dower and curtesy, indefinite references.

Not the least important of these is the Uncertain and Obsolete Restrictions Act of 1960, which added Sections 26 to 30 of Chapter 184. Like the marketable title acts of a number of other states, this goes far toward enabling a fixed period of search without finding a notice to be relied upon, starting with 50 years and gradually reducing to 30, and recognizes that as stated in our 32nd Report (1956 page 22) “the need of recording of evidence to bring the document within a reasonable period of search is like the original need of recording.”

Section 360 recommended by the other members of the council would substantially defeat the purpose of that act by creating an interest not apparent on the ground or likely to be found except by record search without any limit of period of search — and thus eventually increasing the work and costs in all title transactions — the first time this council has recommended an act that creates such a new conveyancing difficulty for all.

Restrictions held by public or charitable bodies do present special problems not fully foreseen in 1960. The risk of rights so held being lost through failure of some official to record a notice in time should be avoided if reasonably possible, even where the bodies now are willing to assume the risk.

There does not seem to be any way that this conflict of public interests can be resolved so long as name indexes must be relied upon to locate the documents. In my opinion, the most practical solution to this dilemma is to provide at the local registeries a map or set of maps of the city or town from which the restricted lots and appropriate references to the documents can be readily determined, and to eliminate the recording of notices when this is done, as provided in my recommended Section 33 and amendment to Section 26.

Tract indexing for all recorded documents has been permitted in many other states and in effect for many large urban counties for many years, and is generally recognized as a much more efficient system of indexing than by owner's names.

Many title insurance companies in may large cities get copies of all recorded documents and maintain their own tract indexes on which to base their insurance. Such indexing can make possible elec-



tronic data retrieval processing and savings in man hours and greater certainty. The main deterrent to wider adoption of tract indexing in local recording offices is the cost of initial plans showing all parcels and of keeping them current.

Conservation Commissions are required by Section 8C of Chapter 40 to keep indexes of all open lands in their towns.

For lands where restrictions are required, reasonably adequate surveying and lot plans should, if at all possible, be required. Tract indexing, however, does not necessarily require such surveying and plans. It can be sufficient for identification if the approximate boundaries are added by outline to the most practically available maps. Many cities and towns already have plans used by assessors showing individual parcels, which should be sufficient. Many of these are already on file at registeries of deeds. There are few, if any, cities or towns which do not have some map or maps sufficient for the purpose.

If any city or town cannot provide a plan sufficient for this purpose, there may be doubt as to whether it could properly administer public restrictions, and it would not be unreasonable to require it to record notices of restriction. There will undoubtedly be many practical details to be worked out in connection with such tract indexes; but the rule making power to be given to the Registers of Deeds with the approval of the Open Lands Commission should be sufficient for the purpose.

The present exclusion of orders of taking from the first sentence of Section 26 was added at the enactment stage to the proposed act as we recommended it, and is not satisfactory in that it does not include restrictions acquired by public bodies by means other than taking, and in that it would exclude conservation or preservation easements or restrictions if established by order of taking, but not otherwise. The exclusion was added, we understand, primarily because of restrictions previously imposed in connection with certain highways and tunnels.

The purpose of such exclusion would be better served by one referring to all restrictions held by public bodies, regardless of how acquired, and would not be impaired by a limitation to those acquired, in connection with a highway, tunnel, airport, building or other public facility maintained in the vicinity of the subject land, which would at least limit the search necessary by purchasers and

lenders generally to determining whether there were such public facilities in the vicinity, except in instances where such were found.

It is also advisable to clarify the definition of restriction at the beginning of Section 26 in line with the construction which the Handbook of the Association of Conservation Commissions has placed on it, to cover specifically easements forbidding or limiting particular uses or acts.

The recommended public restriction tract index should also be permitted to indicate lands subject to various restrictions now in use which are often difficult for the purchasers and lender to determine and a trap for the unwary, such as specified in the fourth sentence of my recommended section 33.

To have in due course maps of each city and town showing where these various forms of public restriction apply should also aid public understanding of what is being done and long term planning processes and be a healthy influence toward responsible administration.

In the preparation of the draft act set forth at the end of this separate opinion and in the preparation of this opinion, I have received the assistance of Albert B. Wolfe of the Boston Bar who has assisted the Judicial Council in past years in connection with several of our recommendations on conveyancing matters which have been enacted. Mr. Wolfe is a member of the Massachusetts Historical Commission and Chairman of the Cambridge Historical Commission. The draft act I recommend is intended to meet substantially both the objectives of the proponents of S. 360 and the objections of the Home Builders Association and of the conveyancing bar.

It will be submitted to those who comprised the Special Commission whose report is House 3769 of 1966, to the Massachusetts Historical Commission, and to the Massachusetts Conveyancer's Association Legislative Committee, in order that their views, and, I hope, their suggestions for improvements, may be known by the time the draft acts come on for hearing.

For the reasons set forth above, I recommend the following:

## 1967 DRAFT ACT

### (MINORITY PROPOSAL)

---

AN ACT ESTABLISHING AN OPEN LAND RESERVATION PROGRAM FOR MASSACHUSETTS, CLARIFYING THE STATUTES RELATING TO RESTRICTIONS ON THE USE OF LAND AND CONSTRUCTION THEREON, PROTECTING EASEMENTS, COVENANTS AND RESTRICTIONS HELD BY PUBLIC BODIES, AND CONSERVATION AND PRESERVATION RESTRICTIONS HELD OR APPROVED BY APPROPRIATE PUBLIC AUTHORITY, AND PROVIDING FOR PUBLIC RESTRICTION TRACT INDEXES AT REGISTRIES OF DEEDS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1    *Section 1.* Chapter 21 of the General Laws is hereby amended  
2 by adding the following three sections: —

3    *Section 26.* There is hereby established within the depart-  
4 ment the Massachusetts open lands commission, hereinafter and  
5 in sections twenty-seven and twenty-eight referred to as the  
6 commission, which shall be unpaid and which shall consist of  
7 the commissioner of natural resources who shall be designated  
8 chairman, the commissioner of agriculture, the commissioner of  
9 corporations and taxation, the commissioner of commerce and  
10 development and three persons to be appointed by the governor.  
11 Upon the expiration of the term of office of an appointive mem-  
12 ber his successor shall be appointed for a term of three years.  
13 The members of the commission may be reimbursed for expenses  
14 incurred in carrying out their official duties. The commission shall  
15 meet monthly and at the call of the chairman, or any three mem-  
16 bers, and shall consult on matters relating to the reservation of  
17 lands and waters within the commonwealth in their natural or  
18 open state, including farms and wood lots. The commission shall,  
19 in its deliberations, consult with and consider plans of state,  
20 metropolitan, regional, county and municipal planning and re-  
21 source agencies. The commission may engage such assistants as it  
22 shall deem necessary to carry out the purposes of this section.

23    *Section 27.* The commission shall designate land and water  
24 areas for each city and town within the commonwealth which  
25 should be retained predominantly in a natural or open state by  
26 reason of their value for conservation, recreation, agriculture,  
27 forestry, water supply and proper municipal, regional and state  
28 resource planning. Designation shall be accomplished by majority  
29 vote of the commission subject to approval in a manner here-  
30 inafter provided: in the case of a city by majority vote of the city  
31 council, or board of aldermen with the further approval of the

32 mayor, and in a town by majority vote of a town meeting or by a  
33 majority vote of each of the following agencies: board of select-  
34 men, planning board, if any, and conservation commission, if any.

35 *Section 28.* The commission is empowered to adopt rules and  
36 regulations which shall provide procedures and standards for  
37 designations of pursuant to section twenty-seven, and for approvals  
38 acquisition of conservation restrictions pursuant to section eight C  
39 of chapter forty. Such procedures and standards shall comply  
40 with the purposes set forth in sections twenty-six and twenty-seven  
41 and shall safeguard the use of lands for such purposes.

1 *Section 2.* Section 8-C of Chapter 40 of the General Laws as  
2 most recently amended by Chapter 768 of the Acts of 1965, is  
3 hereby further amended by substituting for the thirteenth  
4 sentence, the following:

5 Said commission may acquire by purchase, gift, grant, bequest,  
6 devise, lease, or otherwise the fee in such land or water rights, or  
7 any lesser interest, easement, restriction, covenant, or other con-  
8 tractual right including conveyances on conditions or with limita-  
9 tions or reversions, as may be necessary to acquire, maintain, im-  
10 prove, protect, limit the future use of or otherwise conserve and  
11 properly utilize open spaces and other land and water areas within  
12 its city or town, and shall manage and control the same. Any ac-  
13 quisition of the fee in land or any rights or lesser interests therein  
14 including conservation restrictions and any covenants or con-  
15 tractual rights shall be in the name of the city or town and  
16 all such acquisitions shall be subject to the prior approval of  
17 the city council or board of aldermen and the mayor in a city  
18 or a town meeting or the selectmen in a town, and in case of  
19 conservation restrictions, defined in section thirty-two of chapter  
20 one hundred eighty-four, unless the area has been designated  
21 pursuant to the open land reservation program authorized by  
22 sections twenty-six to twenty-eight of chapter twenty-one, shall  
23 be subject also to the approval of the Massachusetts open lands  
24 commission established pursuant to said section twenty-six, as  
25 necessary and appropriate for protection of natural land or  
26 water resources, and in case of a town having a planning board  
27 unless approved by a town meeting, subject also to the approval  
28 of such board.

1 *Section 3.* Section 23 of Chapter 184 of the General Laws is  
2 hereby amended by adding at the end of the last sentence there-  
3 of: “, or which are subject to section thirty-one”.

1 *Section 4.* Section 26 of Chapter 184 of the General Laws  
2 is hereby amended by substituting for the first sentence thereof  
3 the following: “All restrictions on the use of land or construction  
4 thereon which run with the land subject thereto and are imposed  
5 by covenant, agreement, easement forbidding or limiting partic-



6 ular uses or acts, or otherwise, whether or not stated in the form  
7 of a condition, in any deed, will or other instrument, shall be  
8 subject to this section and sections twenty-seven to thirty, except  
9 (a) restrictions imposed by lease or license or by mortgage or  
10 other security instrument, (b) restrictions acquired and held by  
11 any body politic within the jurisdiction of which the land is  
12 located, or by any public instrumentality of such a body politic,  
13 in connection with any public highway, tunnel, airport, building  
14 or other facility maintained by such body or instrumentality in  
15 the vicinity of the subject land, and (c) restrictions which are  
16 subject to section thirty-one and are indexed in a public restric-  
17 tion tract index maintained pursuant to section thirty-three.

1 *Section 5.* Section 27 of Chapter 184 of the General Laws is  
2 hereby amended by adding at the end of clause (a) (1) thereof,  
3 before the word “or”, the words “or is entitled to such benefit  
4 as a successor to such party,”.

1 *Section 6.* Section 30 of Chapter 184 of the General Laws  
2 is hereby amended by adding at the end of the last paragraph  
3 thereof: “This section shall not apply to restrictions which are  
4 subject to section thirty-one.”

1 *Section 7.* Chapter 184 of the General Laws is hereby  
2 amended by adding at the end thereof the following three  
3 sections: —

4 *Section 31.* No easement, covenant or restriction acquired  
5 and held by any body politic or public instrumentality of a body  
6 politic affecting land within its jurisdiction, and no conservation or  
7 preservation restriction approved and held as provided in section  
8 thirty-two, shall be unenforceable against the owners of the land  
9 at time of the acquisition or against their successors in title on  
10 on account of lack of privity of estate or contract or of benefit to  
11 particular land or on account of the benefit being assignable or  
12 assigned to any other such body politic or instrumentality, or in  
13 case of conservation or preservation restriction, to any charitable  
14 organization similarly organized, if the instrument of acquisition is  
15 duly recorded and indexed at the registry of deeds for the county  
16 or district where the subject land lies and describes the land by  
17 metes and bounds or by appropriate reference to plan showing  
18 its boundaries which is so recorded. This section shall not be  
19 construed to imply that any other easement, covenant or restric-  
20 tion shall, on any such account, be unenforceable.

21 *Section 32.* A conservation restriction means a right, whether  
22 or not stated in the form of a restriction, easement, covenant, or  
23 condition, appropriate to retaining land or water areas predom-  
24 antly in a natural or open state, to forbid or limit (a) construction  
25 or placing of buildings, roads, outdoor billboards, signs or other  
26 advertising, or utility or other structures, (b) dumping or placing

27 of trash, waste, or unsightly or offensive materials, (c) removal  
28 or destruction of trees, shrubs or other greenery, (d) excavation  
29 or removal of loam, peat, gravel, soil or other mineral substance,  
30 (e) use except for farming, agricultural or recreational purposes  
31 or purposes permitting the land to remain in its natural condition,  
32 (f) any change thereon detrimental to existing drainage, flood  
33 control, water conservation, erosion control or soil conservation,  
34 (g) commission of strip or waste, or (h) any one or combination  
35 of such acts or uses or other acts or uses detrimental to the land or  
36 water as a natural resource.

37 A conservation restriction shall be considered approved if (a)  
38 acquired and held by a city or town pursuant to section eight-C of  
39 chapter forty, or (b) acquired and held by any other body politic  
40 or public instrumentality of a body politic having jurisdiction,  
41 and the subject area is designated pursuant to the open land  
42 reservation program authorized by sections twenty-six to twenty-  
43 eight of chapter forty, or (c) acquired and held by a charitable  
44 organization organized for purposes including conservation of open  
45 space areas, and approved by the city or town in the same manner  
46 as for acquisition by it, and unless the subject area is designated  
47 pursuant to said open land reservation program, approved also  
48 by the Massachusetts open lands commission, established pursuant  
49 to said section twenty-six as necessary and appropriate for pro-  
50 tection of natural land or water resources, and in case of a town  
51 which has not approved by vote of a town meeting, approved by  
52 its conservation commission, if any, and its planning board, if any.

53 A preservation restriction means a right, whether or not stated  
54 in the form of a restriction, easement, covenant or condition, ap-  
55 propriate for preservation of a structure or site historically signifi-  
56 cant for its architecture or associations, to forbid or limit (a)  
57 alterations in exterior or interior features of a structure, (b)  
58 changes in appearance of the site, (c) uses not historically ap-  
59 propriate, or (d) any one or combination of such acts or uses, or  
60 other acts or uses detrimental to appropriate preservation of the  
61 structure or site.

62 A preservation restriction shall be considered approved if (a)  
63 acquired and held by a city or town pursuant to section eight-D  
64 of chapter forty, or otherwise, or (b) acquired and held by any  
65 other body politic or public instrumentality of a body politic  
66 having jurisdiction, pursuant to a program for historical preserva-  
67 tion, or (c) acquired and held by a charitable organization organ-  
68 ized for purposes including preservation of buildings or sites of  
69 historical significance and approved by the historical commission  
70 of the city or town acting under section eight-D of chapter forty, if  
71 any, or by an historic district commission acting under chapter  
72 forty-C or commission having like powers under any special  
73 act, ordinance or by-law in the city or town, or by the Massa-  
75 twenty-six of chapter nine, as necessary and appropriate for pres-

76 ervation of a structure or site which it deems historically signif-  
77 icant for its architecture or association and worthy of preservation.

78 Conservation and preservation restrictions are interests in land  
79 which may be acquired by such bodies politic, public instrumen-  
80 talities and charitable organizations in such manner as they may  
81 acquire land and other interests in land, and when such acquisi-  
82 tion by taking by eminent domain under chapter seventy-nine  
83 is authorized, may be so taken by order describing the subject  
84 land and setting forth the particular restriction or restrictions  
85 taken. Such a restriction may be enforced by the holder of it  
86 by injunction or proceeding in equity, shall entitle representa-  
87 tives of the holder to enter the land at reasonable times to assure  
88 compliance, and may be released in whole or in part at any time  
89 by the holder as no longer appropriate in the public interest,  
90 provided approvals are given for release in the same manner as  
91 for acquisition.

92 Approvals may be evidenced by certificate of the chairman  
93 or secretary of the commission or board, recorded with the in-  
94 strument imposing the restriction or noted on the margin there-  
95 of, or on the Certificate of Title if the land is registered.

96 *Section 33.* Any city or town may file with the register of  
97 deeds for the county or district in which it is situated a map  
98 or set of maps of the city or town, to be known as the public  
99 restriction tract index, on which are indicated sufficiently for  
100 identification (a) land in such city or town on which there is a  
101 restriction on use or construction which is subject to the provi-  
102 sions of sections twenty-six to thirty unless indexed in such index,  
103 (b) the name of the holder of the restriction, and (c) the book  
104 and page of record or registered document number of the in-  
105 strument of acquisition. Maps used by assessors to identify parcels  
106 taxed, and approximate boundaries without distances, shall be  
107 sufficient, and where maps by parcels are not available, addition  
108 to other maps of approximate boundaries of restricted land shall  
109 be sufficient. If the names of the holders and the instrument  
110 references cannot be conveniently shown directly on the maps,  
111 they may be indicated by appropriate reference to accompany-  
112 ing lists. Such maps shall also indicate, so far as practicable,  
113 lands subject to orders affecting coastal wetlands issued pursuant  
114 to section one hundred five of chapter thirty, and the approxi-  
115 ate boundaries of any historic or architectural control districts  
116 established under chapter forty-C or any special act, ordinance  
117 or by-law where a certificate of appropriateness may be required  
118 for exterior changes, and of any landmarks certified by the  
119 Massachusetts Historical Commission pursuant to section twenty-  
120 seven of chapter nine, and may indicate also any other land  
121 which any body politic or public instrumentality of any body  
122 politic may own in fee, or in which it may hold any other  
123 interest, and such additional data as the city or town may deem

124 appropriate. The maps shall be in such form that they can be  
125 readily added to, changed and reproduced, and shall be a public  
126 record, appropriately available for public inspection.

127 Whenever any instrument of acquisition of a restriction or other  
128 appropriate evidence entitled to be indexed in the tract index is  
129 received for record, the register shall make, or require the holder  
130 of the restriction to make, appropriate additions to the tract  
131 index, and such additions shall, as to instruments previously re-  
132 corded, be likewise made on request of the holder. If any other  
133 body politic, public instrumentality of a body politic, or chari-  
134 table organization holds a restriction entitled to be indexed in a  
135 tract index in a city or town which has not filed such an index,  
136 such body, instrumentality or organization may file such an index.  
137 New tract indices may be filed from time to time when needed  
138 after determination by the register that prior proper references  
139 have not been omitted. The registers of deeds, or a majority of  
140 them, may, from time to time with the approval of the Massachu-  
141 setts open lands commission and the attorney general, make and  
142 amend rules and regulations for administration of public re-  
143 striction tract indices, and the provisions of section thirteen-A  
144 of chapter thirty-six shall not apply thereto.

1 *Section 8.* Commission members appointed under section one  
2 of this act shall be appointed initially for terms of one, two and  
3 three years, respectively and thereafter shall be appointed in  
4 accordance with this section.

1 *Section 9.* The time for filing a notice of restriction with  
2 respect to any restriction existing at the effective date of this Act  
3 and not theretofore required to be filed shall not expire sooner  
4 than one year after said effective date, nor, in case of a restric-  
5 tion entitled to be indexed in the public restriction tract index  
6 until January 1, 1973. Any restriction heretofore subject to  
7 sections twenty-six to thirty of chapter one hundred eighty-four  
8 which would not have been so subject had this Act been sooner  
9 in effect, shall have the same force as though never subject to  
10 said section twenty-six to thirty. Section seven of this Act shall  
11 apply to easements, covenants and restrictions existing before the  
12 effective date of this Act as well as to those created thereafter.



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# FORTY-THIRD REPORT

## Judicial Council of Massachusetts

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# FORTY-THIRD REPORT

## Judicial Council of Massachusetts

### — 1967 —

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## The Commonwealth of Massachusetts

### JUDICIAL COUNCIL

DECEMBER, 1967

TO HIS EXCELLENCY, JOHN A. VOLPE,  
*Governor of Massachusetts*

In accordance with the provisions of  
Section 34B of chapter 221 of the General  
Laws (Ter. Ed.), we have the honor to  
transmit the forty third annual report of the  
Judicial Council for the year 1967.

FREDERIC J. MULDOON, *Chairman*

REUBEN L. LURIE

JOHN A. COSTELLO

ELWOOD HETTRICK

ELIJAH ADLOW

CHARLES W. BARTLETT

LIVINGSTON HALL

RAYMOND F. BARRETT

ARTHUR A. THOMSON

## JUDICIAL COUNCIL

G. L. (Ter. Ed.) Ch. 221 §§34A-34C

The Judicial Council Was Established To Make A Continuous Study of The Organization, Procedure and Practice Of The Courts.

### Statutory Authority

*Section 34A.* There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods not exceeding four years, as he shall determine.

*Section 34B.* The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

*Section 34C.* No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof shall receive from the commonwealth a salary of five thousand dollars.

## MEMBERS OF THE JUDICIAL COUNCIL (DECEMBER, 1967)

FREDERIC J. MULDOON of Westwood, *Chairman*

REUBEN L. LURIE of Brookline  
JOHN A. COSTELLO of Andover  
ELWOOD HETTRICK of Wellesley  
ELIJAH ADLOW of Boston

LIVINGSTON HALL of Concord  
RAYMOND F. BARRETT of Milton  
ARTHUR A. THOMSON of North Andover  
CHARLES W. BARTLETT of Dedham

JAMES B. MULDOON of Weston, *Secretary*  
One Court Street, Boston, Massachusetts 02108  
Telephone 742-3711

### INQUIRIES CONCERNING THIS REPORT

This report is distributed by the Public Document Room at the State House in Boston. Copies are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others. As long as the supply lasts, copies of this report, and also copies of some earlier reports, can be obtained, without charge, by requesting them from the Public Document Room, State House, Boston, Massachusetts.

Correspondence may be sent to James B. Muldoon, Secretary, Judicial Council of Massachusetts, One Court Street, Boston, Mass. 02108.

### BRIEF HISTORY OF THE JUDICIAL COUNCIL AS AN ADVISORY BODY AND ITS RELATION TO THE COURTS, THE BAR AND THE ADMINISTRATION OF JUSTICE

Since the purpose and history of the Council may not be familiar to more recent members of the legislature, public officials and members of the legal profession, a brief outline may be of assistance.

The Council was created as an advisory body on the recommendation of the Judicature Commission of 1919-20, which said:-

The legislative committees on the judiciary and on legal affairs are in constant session every year hearing petitions for legislation of every variety relative to the courts, submitted mainly by individuals. Some of these suggestions have been carefully prepared and thought out, while many of them have not. These committees render good service to the Commonwealth in dealing with such proposals. Both of these committees, however, are overburdened with the many petitions for legislation presented to them every year, in addition to the work of the individual members in other connections.

"It is not a good business arrangement for the Commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The interest of the people, for whose benefit the courts exist, calls for some central clearing house of information and ideas which will focus attention upon the existing system and encourage suggestions for its improvement."

Shortly after the creation of the Massachusetts Judicial Council in 1925, the General Court gave another assignment to the Council:

1925 RESOLVES, CHAPTER 27

"Resolved, That the judicial council is hereby requested to investigate ways and means of expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and among other things . . . measures for discouraging frivolous appeals; measures for requiring parties to frame issues in advance of trial by greater specification in the declaration of what the plaintiff in good faith claims and greater specification in the answer of what the defendant admits or in good faith denies, with suitable penalties for frivolous or unfounded allegations and denials; ways and means for encouraging, so far as consistent with constitutional rights trials without jury . . . and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925.)"

Justice is an ideal for which we strive. To do justice requires a constant effort on the part of the bench and the bar, and to improve the procedures which are designed to achieve the ideal, the General Court and the Judiciary shall continue to cooperate. It is in this atmosphere that the Judicial Council stands ready to act.

Since 1925 the legislature has constantly passed resolves requesting reports on the specified matter of pending bills on which the General Court wishes advisory assistance. With the exception of those matters so broad in scope that the Council is not equipped to act, these requests of the General Court have been answered with the advice and judgment of the members of the Council.

For the convenience of the legislature and the courts and practising lawyers we call attention to the fact that annexed to the 27th report in 1951 was an index to the contents of these reports since 1919, with an introductory statement and an annotated list of statutes passed after recommendation of the Judicature Commission and of the Judicial Council, *with references to the reports where the reasons for each statute may be found*. This list of statutes brought down to 1954, was reprinted for reference in the Massachusetts Law Quarterly for February 1955, Vol. 40, No. 1. An index to all the reports of the council will be made in the future.



## JUDICIAL COUNCIL 1967 HOUSE AND SENATE BILLS REFERRED TO THE JUDICIAL COUNCIL

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H. 1427	1	Investigation, Study, And The Drafting Of Appropriate Legislation Relative To The Establishment And Operation Of An Intermediate Appellate Court In This Commonwealth . . . . .	14
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		tion For Certain Misdemeanors Shall Be Destroyed Seven Years From The Date Of The Conviction For The Last Such Offense .....	91
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H. 4714	54	Relative To Prohibiting The Entries Of Nonsuits, Dismissals Or Defaults In Any Civil Action If The Parties Agree That The Cause Be Continued .....	49
S. 1123	137	Relative To Providing For The Trial Of Civil Actions Entered In District Courts In Certain Counties By Juries Of Six, And The Subject Matter Of Providing For Juries Of Twelve In Civil Actions In The District Courts .....	17
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## IMPROVEMENTS IN JUDICIAL ADMINISTRATION

### Special Report Relative to the Increase in the number of Associate Justices of the Superior Court

At the request of His Excellency, the Governor, the Judicial Council made the following report early in 1967. Subsequently the views of the Judicial Council were presented to the Judiciary Committee.



#### JUDICIAL COUNCIL OF MASSACHUSETTS

One Court Street  
Boston, Massachusetts 02108

February 2, 1967

TO HIS EXCELLENCY JOHN A. VOLPE  
GOVERNOR OF MASSACHUSETTS  
State House, Boston, Massachusetts

Your Excellency:

SUBJECT: SPECIAL REPORT ON THE ENLARGEMENT OF THE SUPERIOR COURT.

In response to your request of January 13, 1967, we have reviewed the more recent proposals for an increase in the number of Associate Justices of the Superior Court and report as follows:

At present there are forty-one (41) Associate Justices and one Chief Justice of our Superior Court.

In a period of about 100 years the Superior Court has increased from ten to forty-two. The population of the Commonwealth in that period has increased from 1.2 million to about 5.5 million.

Our great jury trial court is a tribunal which enjoys the respect and confidence of every citizen of this commonwealth. It is the bar of justice before which the major issues between our citizens (and between our citizens and the commonwealth) are determined.

Few are those whose cases are finally decided by the Supreme Judicial Court. It is not there that the issues are tried before the jury of one's fellow men. As vital and as necessary as they may be, our district and municipal courts have neither the legal authority nor the facilities to fulfill the responsibility which has fallen upon our Superior bench.

#### New Functions of the Court

Certain functions of our Superior Court are of recent origin. We note particularly: —

1. The Three Judge Panel
2. The Panel to Review Sentencing of Convicted Criminals

3. The Procedure for Declaratory Judgments in Civil Cases
4. The Appeals from the Administrative Agencies of the Commonwealth
5. Appeals from Local Administrative Agencies such as Zoning Boards of Appeal, Planning Boards, and other local agencies
6. Regular Motion Sessions at Worcester and elsewhere

These are but a few of the new legal procedures that have developed since the second World War.

We find that the court which continues to hear the major Equity cases is our Superior Court, and we believe this tradition will remain with us.

Petitions for land damages by reason of urban renewal, highway construction, and other public works have placed a burden on the Superior Court.

The "revolution" in criminal procedure and the recent celebrated criminal cases of great length have occupied sessions of our Superior Court for extended periods of time. In one instance a judge of our Superior Court was engaged in one case for well over a year. During this period he could not accept other assignments. In order to deal with criminal business, civil sessions have been suspended for long periods.

We call attention to the growth of a vast and complex system of statutes, rules, regulations, administrative decrees, and other restrictions which cause our citizens and often our public officers to seek the decisions of the Superior Court.

As each year passes, the list of such rules, statutes, and decrees grows longer and the need for an umpire increases. We anticipate that the next few years will bring a veritable flood of municipal collective bargaining cases before our courts and this is but one sample of the new responsibilities of the Superior Court.

### **Motor Vehicle Cases**

The constant growth in population and the resulting rise in litigation has increased the business of the Superior Court in all its categories — civil cases, including land damage, equity and criminal matters. Undeniably, including land damage, equity and criminal matters. Undeniably, the number of entries due to motor vehicle accidents has multiplied dramatically over the years; however, contrary to popular notion, these motor tort cases do not demand the major portion of Superior Court judges' time in litigation. The causes of congestion are varied and complex, and the motor vehicle tort case is only a part of this total problem.

We direct your attention to the fact that no society of which we could conceive, could ever devise a judicial system under which *every* motor vehicle case could be tried before a jury.

There has been talk recently of a commission to deal with motor vehicle cases. We reserve judgment on such plans but they have been suggested be-



fore. Short of the most radical alteration of our motor vehicle insurance and claim adjudication procedures, it can be expected that motor vehicle cases will continue to congest all our courts for the foreseeable future.

### **Criminal Business**

Criminal business will occupy more of the time of the Superior Court than ever before. There has been a pronounced increase in this area since 1960.

We now are required to furnish legal counsel to every accused person if he is unable to pay for his own lawyer. An increase in contested criminal cases is therefore inevitable.

### **The Human Element**

In all estates civil, military, or ecclesiastical, and in all organizations, there must be allowance made for absences due to physical disability, injuries, official business, and other substantial reasons.

In a staff of justices such as that of the Superior Court, it would be short sighted not to admit that a percentage of the personnel would be unavailable at a given time. If only two justices were out of action, the result might affect scores of cases scheduled for trial or disposition, hundreds of parties, lawyers, witnesses, police officers and others. The result is a serious economic loss to many.

### **Inadequacy of The Present Court**

We are convinced that the number of associate justices of the Superior Court is currently inadequate and will become increasingly more inadequate each year. To deal with motor vehicle litigation on a reasonable basis, to dispatch criminal business effectively, to settle labor controversies, to handle land damage claims in an era of "Re-development", to afford our citizens relief from the sometimes rash or improper decisions of agencies of state and local government, and to carry on the civil jury sessions efficiently, our Superior Court must be expanded without further delay.

### **A Dubious Tradition**

It has been customary over the course of a century to expand the Superior Court on an emergency basis. In the first thirty years after 1859 four (4) justices were added, yet the population rose about one million. In the next fifteen years ending in 1907 ten (10) more justices were added. The population in that period increased by another million.

From 1907 to 1958 only seven (7) justices were added during a period when the population again increased by a million or so.

Since 1958 ten more justices have been added but this increase merely brought the Superior Court to the strength required in 1935.

We have never closed the "justice gap" which has plagued the Superior Court for thirty years, and when all of the new forms of litigation are added to the picture, the inadequacy of a 1935 court in 1967 is made more obvious. Many piecemeal solutions have been attempted but none has accomplished the desired result.

In days gone by, the addition of two or three justices periodically (so that we got thirty-two new justices in 107 years) may have been acceptable. It is not acceptable now.

We could present a volume of statistics for others to interpret. We choose to interpret the statistics and present our advice and our recommendations to you.

We recommend the addition of no less than ten (10) new Associate Justices of the Superior Court as soon as legislation to this end can be enacted.

### **Relation To Population**

We are satisfied that it is thoroughly reasonable to relate the number of Associate Justices to the population of the Commonwealth. The population of Massachusetts in 1965 was 5,295,281.

Population increases alone suggest that our Superior Court should have ten additional Associate Justices. Added to this, however, is the complexity of the problems of a society which is undergoing great social change in an environment which presents physical and geographical challenges never before known.

It is, in our opinion, clearly demonstratable that a ratio of one justice of our Superior Court for each 100,000 in population is a reasonable and a practical yardstick; and a minimum "yardstick" at best.

### **Other Recommendations**

It should be emphasized that the Chief Justice has frequently stated the need for an enlarged court not only through an increase in personnel but also with supporting facilities.

The point should be stressed that while more judges is the immediate need, an in-depth study is necessary to thoughtfully plan for future needs. Chief Justice Tauro has long urged adoption of such a plan.

We take this opportunity to call to your attention that in the future, under the provisions of Chapter 32 of the General Laws, a judge who has served the commonwealth at least ten years, and who has attained the age of seventy is obliged to retire if he wishes to retain his pension rights for himself and his family. Very recently the first judges affected by this in-

voluntary retirement law have tendered their resignations although they were otherwise ready, willing, and able to perform their duties. The uncertainties of the future being obvious, these judges, appointed since 1956, could not be expected to sacrifice their pension rights, and those of their family unit, in order to render further service. Guaranteed a pension of three-quarters pay, and with possible less financial strain facing them than during the years from age 40 to 65, the sacrifice of 25% of their regular salary was not a difficult nor an unreasonable choice. Judges appointed prior to 1956 remain unaffected by the mandatory retirement age.

As we will now have a group of experienced and capable justices who could render temporary intermittent service at the request of the Chief Justice of the particular court, and as this reserve force was retired by the calender alone, we recommend the enactment of legislation (applicable to all our courts, including the Superior Court) under the terms of which retired justices could fill in on a per diem basis for regular justices who might be absent temporarily by reason of illness or other necessity.

Such service would be performed only at the request of a chief justice and such standby judges would receive the equivalent of 25% of the per diem salary of a regular justice; this being the difference between the amount of their pension and the regular salary established. Such service would, of course, not be mandatory on the part of the retired justice.

We do not desire to have it appear that our recommendation is for an extension of the retirement age. We only recommend temporary active service on a per diem emergency basis. The cost to the commonwealth is small and the convenience to litigants will be great indeed.

This is a unanimous report of the Council.

#### JUDICIAL COUNCIL OF MASSACHUSETTS

FREDERIC J. MULDOON, *Chairman*

REUBEN L. LURIE

JOHN A. COSTELLO

ELWOOD HETTRICK

ELIJAH ADLOW

ARTHUR A. THOMSON

CHARLES W. BARTLETT

LIVINGSTON HALL

RAYMOND F. BARRETT

#### Note

We are pleased that legislation was enacted on January 2, 1968 which provided for four additional justices for our Superior Court. We note that at the same session, the legislature authorized limited appeals by the Commonwealth from adverse pre-trial rulings in criminal cases.

# I. THE COURTS

## Intermediate Appellate Court

### Chapter 1 Resolves of 1967

---

CHAP. 1. RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO THE ESTABLISHMENT AND OPERATION OF AN INTERMEDIATE APPELLATE COURT.

*Resolved*, That the judicial council be requested to investigate the subject matter of the investigation and study proposed by current house document numbered 1427, relative to the establishment, and operation of an intermediate appellate court in this commonwealth, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

*Approved February 21, 1967.*

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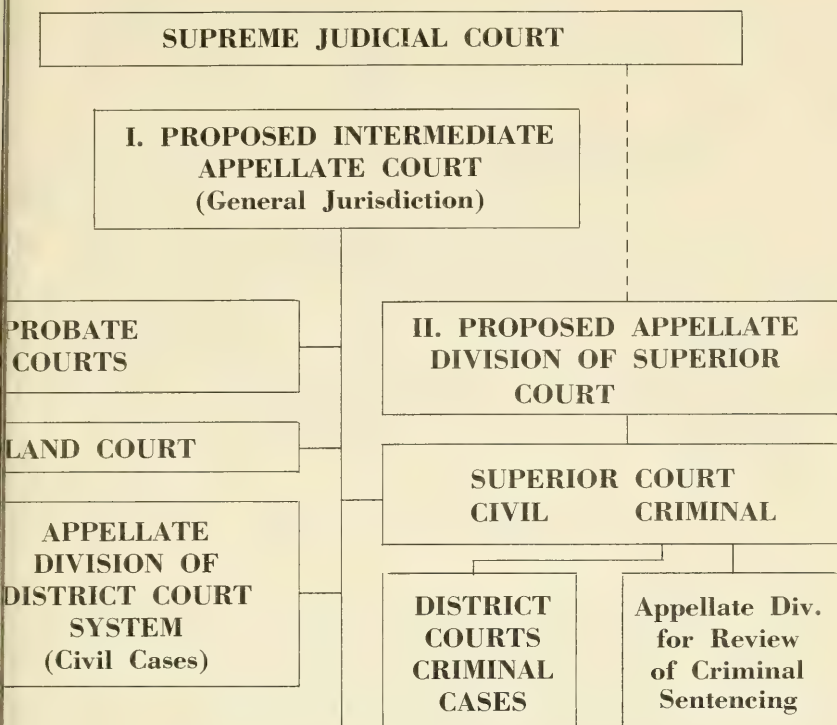
## HOUSE . . . (1967) . . . No. 1427

---

RESOLVE PROVIDING FOR AN INVESTIGATION, STUDY, AND THE DRAFTING OF APPROPRIATE LEGISLATION RELATIVE TO THE ESTABLISHMENT AND OPERATION OF AN INTERMEDIATE APPELLATE COURT IN THIS COMMONWEALTH.

1       *Resolved*, That a special commission, all of whose members  
2       shall have been admitted to the bar of this commonwealth, to  
3       consist of two members of the senate appointed by the presi-  
4       dent, four members of the house of representatives appointed by  
5       the speaker, three persons appointed by the governor, one per-  
6       son appointed by the attorney general, and two persons to be  
7       appointed by the president of the Massachusetts Bar Associa-  
8       tion is hereby created to investigate and study the need for and,  
9       if it finds such need, to draft appropriate legislation relative  
10      to, the establishment in the commonwealth of an intermediate  
11      judicial court of general appellate jurisdiction. Said special  
12      commission shall report to the general court results of this  
13      investigation and study together with any drafts of legislation  
14      necessary to carry its recommendations into effect by filing the  
15      same with the clerk of the house of representatives on or before  
16      August 1, 1967.





The chart indicates the basic structure of the present system by which decisions of the lower courts are appealed to the Supreme Judicial Court.

An intermediate appellate court of general jurisdiction would be placed in our judicial system, as shown, directly under the Supreme Judicial Court. To this court of appeals would come cases from all of the lower courts such as the Superior Court, the Land Court, and the Appellate Division of the District Courts (Civil).

By Chapter 11 of the Acts of 1967 we were asked to consider the proposal for an appellate division in the Superior Court for the hearing of civil cases (law and equity) and also criminal cases.

The appellate division would not be a new court but a department of the present Superior Court staffed with associate justices of the superior court. At present there is an appellate division in the superior court which reviews the sentencing of convicted criminals, on application, in order to make sentences more uniform and to lessen sentences which, while fully authorized, might

appear, on review, to be unduly severe. This existing appellate division does not review the entire case. (See Ch. 278 Sec. 28 A -28 D)

### **The Need for An Intermediate Court**

There is a right on the part of the plaintiff or defendant in the Massachusetts court to have his case reviewed by the Supreme Judicial Court. The Supreme Judicial Court does not have the discretion to refuse to review any case which is properly presented to it. Because of the unrestricted right to have an appeal it is apparent that a quantity of cases are considered by our Supreme Judicial Court where the legal issues are not in serious doubt, or where the matter in controversy is insubstantial.

Because this matter is currently under consideration by the Judicial Conference of Massachusetts, we will make no recommendations in this 43rd Report but will make our position known at a later time.

We are of the opinion that the interests of justice are better served if the court of last resort is given the time to consider those cases which are of major importance and significance.

Our Supreme Judicial Court, in addition to its appellate work, is required to render advisory opinions on questions of the greatest significance, often at short notice. More time should be available to our Supreme Judicial Court for consultations and research on improvement of procedures, rules and judicial administration.

There are intermediate appellate courts in some nineteen states. The federal system was revised many years ago to provide circuit courts of appeal from the federal district courts, rather than a direct appeal to the Supreme Court of the United States where there is no unrestricted right of appeal.

In some states the intermediate courts of appeal handle only criminal cases, or only civil cases exclusively. California, Florida, Illinois, Michigan, Missouri, New Jersey, New York, Ohio and Pennsylvania, (to name some of the populous states) have an intermediate court of appeal for both civil and criminal cases.

We wish to reserve our commentary on this most important subject until we are in a position to make a full and detailed analysis of the proposals now under study. We would suggest that legislative action be deferred until such an analysis, and the recommendations of the Judicial Conference are ready for discussion.

## CIVIL JURY TRIALS IN DISTRICT COURTS

RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO PROVIDING FOR THE TRIAL OF CIVIL ACTIONS ENTERED IN DISTRICT COURTS IN CERTAIN COUNTIES BY JURIES OF SIX, AND THE SUBJECT MATTER OF PROVIDING FOR JURIES OF TWELVE IN CIVIL ACTIONS IN THE DISTRICT COURTS.

*Resolved*, That the judicial council be requested to investigate the subject matter of so much of current senate document numbered 1123, as provides for the trial of civil actions entered in district courts in certain counties by juries of six in certain district courts, and the subject matter of providing for juries of twelve in civil actions in the district courts, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

### CIVIL PROCEEDINGS

Under Chapter 137 of the Resolves of 1967 there was referred to us only so much of Senate (1967) No. 1400 which deals with the trial of civil actions by juries of six in the district courts which are specified in the bill. The resolve also requested us to investigate the idea of trials by the jury of twelve in the district courts of the commonwealth. We thus deal only with Section 1 and Section 4 of the Senate (1967) No. 1123.

With certain changes herein mentioned, we favor this legislation. We think it necessary to make some observations on the subject.

### Places of Six Man Jury Trials

The statute provides that such trials may be held as follows:—

<i>County</i>	<i>City or Town</i>	<i>District Court</i>
---------------	---------------------	-----------------------

Berkshire	Pittsfield	Central Berkshire
Bristol	New Bedford	3rd Dist. Bristol
Essex	Salem	1st Dist. Essex
Hampden	Springfield	Springfield
Middlesex	East Cambridge	3rd Dist. Easn'n Middlesex
Norfolk	Dedham	Northern Norfolk
Plymouth	Brockton	Brockton
Worcester	Worcester	Worcester

Each of the above locations is in a shire town where there is a sitting of the Superior Court, and where there is a courthouse used by the Superior Court.

The statute provides that trials by a jury of six are to be held

"in the respective courthouses of said district courts, or if not practicable there, then in such courthouses of the superior court as are located in the same cities or the same town as said courthouses of said district courts."

Having in mind that cases to be tried before the jury of six can originate in any district court in the counties designated, we do not see why such trials should be limited to the courthouse of the district courts which are named. There is no reason, for example, why a jury trial before a jury of six could not be held in the District courthouse at Lawrence, particularly if Lawrence parties, lawyers, witnesses and possibly jurors are involved. Why should all these people go to Salem. The facilities at Salem District Court are not adequate for jurors.

Possibly one reason for the success of the six man misdemeanor jury trial project in Worcester and East Cambridge is because the arrangements so well serve the people, the area, and the ability of counsel to properly represent their clients. In addition, and this is no inconsiderable thing, the facilities for such trials are good in Worcester and in East Cambridge. In many District Courts a jury trial would be almost ludicrous, considering the facilities at hand.

In view of the rapid means of travel, even the jury panel can be transported quickly and inexpensively to a location which fits the case.

It is our belief that the Chief Justice of the District Courts should be permitted to establish court house locations for the holding of trials by a jury of six. These trials should certainly be held in the same county but not necessarily in the same city as the designated district courts. We think it well known that all of our judges, district, probate, superior, Land Court, and possibly even justices of the Supreme Judicial Court, move about from place to place.

We would also observe the necessities of the existing jury arrangements. District court jury trials would be held during Su-



perior Court jury sessions. The superior court is the source of supply of jurors who could be brought to the district courts as a pool.

The jury of six is a device which can only be used by agreement of the parties (unless another jury trial is to be avoided) for the reason that the constitutional right to a jury trial requires a jury of twelve.

When the court system of Connecticut was reorganized in 1959, the jury system was extended to the district courts. The six-man jury was made available as a matter of course and if there was a demand, a twelve man jury was provided an additional sum was paid by the party making the demand. There is no constitutional reason why such a procedure could not be followed in Massachusetts particularly if a twelve man jury was provided. There are, of course, a number of practical reasons which would make the undertaking difficult until the proper facilities were provided.

In the Connecticut reorganization, the district courts were placed on the footing of circuit courts and the judges were rotated from time to time. The facilities were given for full time district courts under a Chief Justice with ample administrative powers.

The type of reorganization which took place in Connecticut was recommended to the General Court by a Special Commission appointed in accordance with Chapter 158 of the Resolves of 1963. The report of this Commission will be found in House No. 3450 of 1964. It does not appear, however, that all of the court congestion problems of Connecticut were solved by the reorganization.

We cite this report for the reason that it demonstrates the methods by which the jury can be used in the district courts of this commonwealth to help reduce congestion. It is to be remembered always that unless the 12 man jury is provided, the plaintiff or defendant can insist on a Superior Court jury trial.

One of the recommendations in that report was that the Chief Justice of the district courts should have the power to establish the jury sessions in the District courts. Similar authority was proposed for the Boston Municipal Court. Our belief is that this is more practical, and the limits are defined.

In the resolve we were asked to make conclusions and recommendations relative to the jury of twelve in the district courts but recommendations of this sort cannot be made without a consideration of the problem as a whole, and we were not asked for recommendations on the district court system as a whole.

In 1936, the "Special Commission on Investigation of the Judicial System" (House 1750 of 1936) recommended a reorganization of the district courts and one member of the commission, in a separate report, stated:—

If the above plan for reorganization of the district courts is not adopted, then I am in favor of the establishment of the six-man jury system for the trial of civil actions in district courts."

Another member pointed out that the six man jury system "was in operation in the lower courts in Massachusetts for nearly twenty-four years from May 28, 1852 to April 27, 1876" and he also favored this idea. An act providing for the trial of civil actions in all district courts by juries of six was annexed (Appendix G) to the 1936 report.

It would seem that this six man jury plan should be used now but at the same time it should be recognized as an expedient.

In 1964 Robert Meserve of the Boston Bar filed (with others) a "Dissenting Report" in connection with House 3450 of 1964. In this dissent Meserve said:—

"The Superior Court has been the great trial court of the commonwealth to all lawyers. It has developed an experience and competence in dealing with jury cases. Now substantially 75% or more of its jury business is to be taken away from it, without any survey or any discussion with the judges of the Superior Court or their representatives. This seems unwise and precipitate.

Another problem exists which I approach with diffidence and that is the question of control over juries. Members of the bar will recall with distaste the jury fixing scandals of the 1930's. One of the cures which was adopted thereafter was the introduction of the jury pool system in the larger centers of population and a very careful supervision over the conduct of the jury, with the result that few, if any, instances of alleged jury fixing have been suggested in recent years. The proposal of the majority would result in juries—either six man or twelve man—sitting in every District court of the Commonwealth, opening the door, I suggest to the possibility of tampering.

Moreover, in spite of the bland assumptions of the report to the contrary, it is not believed that many of the District Court buildings, old or

new, can readily be adapted to the handling of jury trials, whether by six man or twelve man juries, particularly since both men and women are now eligible to sit on juries in this Commonwealth. Surely a survey of facilities and a determination of their availability should precede legislation as drastic as that suggested in the majority report."

Meserve indicated that to place a jury in each district court might cost almost a million dollars per year, and there was no guarantee of economy or a lessening of congestion. A survey of facilities was provided by a recent resolve but no funds were appropriated to make such a survey realistic.

We thus have a variety of opinions. There is a clamor to reorganize our entire district court system. This was urged in 1936, and since then, notably in 1964.

We are informed that the Institute of Judicial Administration, under a grant from the Massachusetts Bar Association, is making a study of our District courts. In his 10th report, the executive secretary of our Supreme Judicial Court called for a sweeping revision of the district court system. Other voices clamor, still others point with pride to our present system, admitting some of its defects.

In view of these revision and reorganization proposals we prefer not to attempt any partial answers to the question of whether or not we should have full scale jury trials in the district courts or some of them.

For the limited purpose of extending the authority for six man jury trials in some of the district courts we recommend the following draft act.

**(For Draft Act See Page 141)**

## **CRIMINAL PROCEEDINGS**

### **Misdemeanor Jury Trials in District Courts**

#### **An Approaching Deadline**

In 1964 the district courts listed below were temporarily empowered to provide for a speedy second trial by a jury of six in cases of violations of by-laws or of misdemeanors except libel. This provision for a jury of six applies only to a case where the defendant elects to have the six "man" jury trial in a district court rather than a conventional jury trial in the superior court or other disposition in the superior court.

<i>District Court</i>	<i>County</i>	<i>Chapter Acts of 1960</i>
Northern Norfolk	Norfolk	656
Springfield	Hampden	657
Second or Third District of Bristol	Bristol	658
Central Berkshire	Berkshire	659
Brockton	Plymouth	660
First District Court of Essex	Essex	661

In the above cases, the authority expired by the original acts on July 1, 1966 but by Chapter 360 of the Acts of 1966 this authority was extended to July 1, 1968.

By Chapter 609 of the Acts of 1966, the time limit applicable to jury trials of six in the District Court of Eastern Middlesex, and the District Court of Worcester was abolished and the authority was made permanent.

To allow the designated district courts to have authority to provide for such jury trials of six beyond July 1, 1968 we recommend the following:

## 1968 DRAFT ACT

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AN ACT MAKING PERMANENT THE LAWS PROVIDING FOR TRIALS OF MISDEMEANORS BY JURIES OF SIX IN THE DISTRICT COURT OF NORTHERN NORFOLK, THE DISTRICT COURT OF SPRINGFIELD, THE SECOND DISTRICT COURT OF BRISTOL, THE THIRD DISTRICT COURT OF BRISTOL, THE DISTRICT COURT OF CENTRAL BERKSHIRE, THE DISTRICT COURT OF BROCKTON, AND THE FIRST DISTRICT COURT OF ESSEX.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1        *Section 1.* Section 2 of Chapter 656 of the Acts of 1964,  
2 as amended by Section 3 of Chapter 360 of the Acts of 1966  
3 is hereby stricken out.

4        *Section 2.* Section 2 of Chapter 657 of the Acts of 1964,  
5 as amended by Section 4 of Chapter 360 of the Acts of 1966  
6 is hereby stricken out.

7        *Section 3.* Section 2 of Chapter 658 of the Acts of 1964,  
8 as amended by Section 5 of Chapter 360 of the Acts of 1966 is  
9 hereby stricken out.



10     *Section 4.* Section 2 of Chapter 659 of the Acts of 1964,  
11 as amended by Section 6 of Chapter 360 of the Acts of 1966  
12 is hereby stricken out.

13     *Section 5.* Section 2 of Chapter 660 of the Acts of 1964,  
14 as amended by Section 7 of Chapter 360 of the Acts of 1966  
15 is hereby stricken out.

16     *Section 6.* Section 2 of Chapter 661 of the Acts of 1964,  
17 as amended by Section 8 of Chapter 360 of the Acts of 1966  
18 is hereby stricken out.

### **Jury Commissioners — A Warning**

We wish to bring to the attention of His Excellency and the General Court the fact that there is need to again consider the question of jury commissioners for our metropolitan counties of Suffolk, Middlesex, and Norfolk.

In the past year there have come to us some disturbing reports about those who serve on juries.

In at least one well known incident, a juror in Suffolk County was a convicted criminal; still he was serving on the jury.

One of our most respected and experienced justices of the Superior Court took special pains to communicate the following to us this year:—

“At the present time, we are not getting a fair cross section of the community on the juries, and I wish the Judicial Council would again recommend to the Legislature the constitution of a jury commission in the form it did before.

*If the lawyers and legislators only knew what we are getting for jurors now, I think they would vote for a jury commission”*

The public is led to believe that they will be tried by a jury of equals. This is what we attempt to provide. The present methods of assembling the jury do not assure the public of the type of jury which is desirable.

Because of the length of this report we are unable to include a recommended statute. Such a statute appears in our 24th Report for 1948 at pages 19-26. We renewed our recommendation in 1953, 1955, and 1956. We renew this recommendation again.

Only the General Court can enact the legislation which is necessary to protect the public and to protect the commonwealth, and we take this opportunity to once again point to the problem, and the necessity for action.

## II. JUDICIAL "RENEWAL"

### JUDICIAL COUNCIL

## HOUSE . . . (1967) . . . No. 5190

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AN ACT TO ENLARGE THE SCOPE AND FUNCTIONS OF THE JUDICIAL COUNCIL.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       SECTION 1. Section 34A of chapter 221 of the General Laws  
2 is hereby amended by adding at the end thereof the follow-  
3 ing: — Said council shall investigate and evaluate the reason-  
4 able needs of the judiciary on a continuing basis so as to  
5 insure that the court functions at maximum efficiency, and  
6 thereafter to recommend the necessary legislation in regard  
7 thereto.

8       The council shall engage in a continuing examination of  
9 the law of the commonwealth with a view to recommending  
10 such changes as it deems necessary to modify inequitable  
11 rules of law, to correct deficiencies which frustrate the objec-  
12 tives of the law, and to bring the law into harmony with  
13 modern conditions.

14       The council shall receive proposed changes recommended  
15 by the American Law Institute, the National Conference of  
16 Commissioners on Uniform State Laws, bar associations,  
17 judges, lawyers, members of the general court, house and  
18 senate counsel, public officials, as well as any other individu-  
19 als or groups.

1       SECTION 2. Section 34C of chapter 221 of the General Laws  
2 is hereby amended by striking out the final sentence and  
3 inserting in place thereof the following two sentences: — The  
4 secretary of said council, whether or not a member thereof,  
5 shall receive from the commonwealth a salary of ten thou-  
6 sand dollars.

7       The council shall be provided with the full-time services of  
8 a law clerk, who shall be a recent law school graduate and  
9 member of the Massachusetts bar to be selected by the  
10 secretary and to serve on an annual basis at the pleasure of  
11 the council; said law clerk to perform legal research, writing,  
12 and whatever other duties the secretary shall prescribe, at an  
13 annual salary equal to that received by the law clerks of the  
14 superior court and the supreme judicial court.

## CHAPTER 160 — RESOLVES OF 1967

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RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO ENLARGING THE SCOPE AND FUNCTIONS OF THE JUDICIAL COUNCIL.

*Resolved*, That the judicial council be requested to investigate the subject matter of current house document numbered 5190, as amended by the Senate, striking out section 2, relative to enlarging the scope and functions of the Judicial Council, and to include its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

This bill resulted from the recommendations of many persons in all three branches of government, and from the recommendations of law professors and the Massachusetts Bar Association. In the inaugural address in January 1967, His Excellency stated that support for the equal and independent judicial branch of government must be assured at all times:—

“In providing this support, I believe that a permanent means of official communication between the judiciary and other branches of government is desirable, especially in making known and ascertaining the reasonable needs of the courts. Heretofore this has been done on a patchwork basis, often, unfortunately, with undesirable political overtones. A permanent advisory committee representing all three branches of government could function effectively in this area without transgressing on their fundamental independence. As an alternative, this function might be carried out by the Judicial Council, through an enlargement of its scope, personnel and resources. This is a subject that will be the basis of a special message by me in the near future.”

Study was given to the possibilities of an advisory committee as advocated by his Excellency. After much consideration a decision was made to have the function carried out by the Judicial Council.

On February 21, 1967 the governor sent the following special message to the General Court:—

# HOUSE . . . . . No. 4404

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## The Commonwealth of Massachusetts

EXECUTIVE DEPARTMENT

STATE HOUSE, BOSTON, FEBRUARY 21, 1967.

*To the Honorable Senate and House of Representatives:*

In my inaugural message, I expressed the hope that we in the Executive and Legislature would be able to provide

“a permanent means of official communication between the Judiciary and other branches of government . . . especially in making known and ascertaining the reasonable needs of the courts.”

I suggested as two possible courses we might follow in this regard either the establishing of a permanent advisory committee on the Judiciary on which members of all three branches of government are represented, or in the alternative, an expansion in the scope, personnel and facilities of the existing Judicial Council.

After lengthy study and consultation, I have come to the conclusion that the latter alternative would be the better approach at this time. Rather than creating an additional new body which might result in greater expense, duplication of efforts, and overlapping functions, it would be simpler and more efficient in this instance to provide the necessary resources to strengthen our existing Judicial Council and enable it to function in a more effective manner.

The history of the Judicial Council in Massachusetts reveals an interesting phenomenon which has also occurred on other occasions and in other areas; that is, that this Commonwealth has often taken the lead in the development of beneficial ideas and programs which other states have seen fit to follow and adopt.

Unfortunately it is also true that once having taken the initiative in these areas, we in Massachusetts often fail to provide the resources necessary to maintain the development of our programs at the highest possible level. Conversely, many of the other states are quick to build upon our experience and improve on our ideas so that their methods often result in systems more attuned to the needs of modern society than our own.

So it has been with the Judicial Council. In 1923, Massachusetts was in the forefront in developing the concept of establishing a body to represent the Judiciary in its efforts at constantly improving and modernizing the administration of justice. The idea was enthusiastically received elsewhere so that today every state in the Union has followed this procedure. Unlike the others, however, Massachusetts has not given its own pioneer Council the powers and resources to continue to the fully effective job of which it is capable in this critical area. Despite the limited resources and personnel which have been made available to it, our Judicial Council — which is the only body representing *all* the courts of the Commonwealth — has managed to produce excellent work over the years.



The Council has continuously advocated the acceptance of new and more efficient methods of improving our judicial system. Equally important, it has provided the perspective of practical experience to discourage the hasty adoption of measures not in the best interests of the Commonwealth.

Only a few of the many examples can be cited here. The Judicial Council led the way in the adoption of procedures for the review of criminal sentences in our Superior Court to provide for fairer and more uniform application of the laws; for the use of alternate jurors in protracted criminal cases to prevent mistrials and the resulting additional cost in time, energy, and dollars; for the broadening of the declaratory judgment procedure facilitating speedier and more efficient determination of controversies; for the use of the third-party procedure and consolidation of cases so that the claims of several litigants could be settled in one trial; and for such vital pre-trial reforms as written admissions of fact and oral depositions.

The Council has also been instrumental in improving the administration of the district courts, modernizing and making fairer the eminent domain proceedings, the institution of jury-waived trials, and the protection of indigent defendants in non-capital cases long before the United States Supreme Court made it a mandatory proceeding.

In these and many other ways the Judicial Council has long been a strong voice advocating in the best interests of our citizens and for the more efficient and economical handling of the business before the courts.

Nevertheless, the problems of the Judiciary have grown faster than our efforts to alleviate them. It is appropriate that we should turn to the Judicial Council for suggestions as to ways and means of meeting these problems. In all respects it should be enabled to serve as an effective forum, so that matters of importance to the Judiciary can be better communicated to the executive and legislative branches of government.

Further, I recommend enactment of the attached legislation which would strengthen and expand the scope and functions of the Judicial Council. This legislation would also authorize the Council to employ a law clerk to assist it in performing its duties, and would increase the salary of its Executive Secretary in a manner commensurate with the increase in his duties.

To that end, I shall recommend in a subsequent budget message that the Legislature increase the appropriation of the Judicial Council so as to provide for an additional fulltime clerk-typist, library facilities, expanded office space, and the higher printing costs necessary to report on a greater number of projects.

Respectfully submitted,

JOHN A. VOLPE.

*Governor of the Commonwealth.*

## The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Sixty-Seven.

AN ACT TO ENLARGE THE SCOPE AND FUNCTIONS OF THE JUDICIAL COUNCIL.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       SECTION 1. Section 34A of chapter 221 of the General Laws  
2       is hereby amended by adding at the end thereof the follow-  
3       ing:—Said council shall investigate and evaluate the reason-  
4       able needs of the judiciary on a continuing basis so as to  
5       insure that the courts functions at maximum efficiency, and  
6       thereafter to recommend the necessary legislation in regard  
7       thereto.

1       SECTION 2. Section 34C of chapter 221 of the General Laws  
2       is hereby amended by striking out the final sentence and  
3       inserting in place thereof the following two sentences:—The  
4       secretary of said council, whether or not a member thereof,  
5       shall receive from the commonwealth a salary of ten thous-  
6       and dollars.

7       The council shall be provided with the full-time services of  
8       a law clerk, who shall be a recent law school graduate and  
9       member of the Massachusetts bar to be selected by the  
10      secretary and to serve on an annual basis at the pleasure of  
11      the council; said law clerk to perform legal research, writing,  
12      and whatever other duties the secretary shall prescribe, at an  
13      annual salary equal to that received by the law clerks of the  
14      superior court and the supreme judicial court.

While the special message from the Governor was being considered by the General Court, another bill was considered by the Judiciary committee which called for a Massachusetts Law Study Commission. This bill, Senate (1967) No. 473 would establish a new commission with the following purpose and functions:—

- “(a) The Commission shall engage in a continuing examination of the law of the Commonwealth with a view to recommending such changes as it deems necessary to modify inequitable rules of law, to correct deficiencies which frustrate the objectives of the law, and to bring the law into harmony with modern conditions.
- (b) The Commission shall receive proposed changes recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, bar associations, judges, lawyers, members of the General Court, House and Senate Counsel, public officials as well as any other individuals or groups.”

Both bills were eventually referred to the committee on Ways and Means of the House of Representatives.

### **“Judicial Renewal”**

On July 11, 1967 in an editorial entitled “Judicial Renewal” the Boston Herald Traveler stated:—

“A number of bills are in the legislative mill calling for various commissions to study revision of the law and the organization and methods of the judicial system. Many of the bills have been combined in a measure that would establish a Law Study Commission. Rep. Anthony Scibelli, chairman of the House Ways and Means Committee, thinks that instead of creating a new commission, the powers and responsibilities of the proposed group should be given to the present Judicial Council which has the responsibility for continuing study of the judicial system. The Judicial Council has a staff of only one secretary and an annual budget of about \$16,000.00. If it is given the job, it must be given the necessary resources. There is still another group, the Judicial Conference, composed of the state’s top judges, which is studying the judicial process.”

The editorial went on to call for a comprehensive drive toward a system of laws in harmony with modern society. An adequate staff and adequate resources was also recommended.

The Law Study Commission idea is not new to us. In the matter of the proposals for adoption of Uniform State Laws, the Judicial Council has often made recommendations at the request of the General Court. Two uniform laws are being recommended this year, and one is opposed by us.

By 26 Resolves the General Court requested us to investigate and report on the matter of some 37 bills during 1967. We considered a large number of other matters during the year also.

We presume that it is known that six of the members of the Judicial Council are judges who sit in their respective courts every day. Judges Costello, Hettrick, and Adlow have the additional responsibility of being Chief Justice of the court in which they sit. Mr. Hall is a Professor of Law at Harvard Law School and the lawyer members are well known practitioners. Their professional commitments and their public service activities need little comment here.

This picture is presented, not by way of complaint, but to indicate that an adequate staff must support the work of the Judicial Council. Legal Research, correspondence with others in the field of judicial administration, education, and the modern-

ization of procedural and substantive law, preparation of reports, meeting arrangements, the preparation and printing of reports, and many personal conferences and discussions underlie the ultimate decisions and recommendations of the Judicial Council.

### **Legislative History of House 5190**

On August 28, 1967, the Ways and Means committee of the House reported out House No. 5190 which combined the best features of the Governor's bill (House 4404) with the idea of a law revision commission. House 5190 was passed by the House and sent to the Senate where it was referred to the committee on Ways and Means. Subsequently at the end of November it was reported out with an amendment striking out the provision in Section 2 which increased the salary of the Secretary of the Council.

Throughout the year, the Judicial Council supported the governor's bill, the idea of the law study commission, and finally the very reasonable compromise bill, House No. 5190.

The elimination of Section 2, which would have given our Secretary a salary of \$10,000 a year, demands that we advise in all honesty that the Judicial Council simply could not assume any further duties. If the executive secretary is only to receive a salary established in 1947, and never increased in twenty years, it is obvious that he can not assume additional work.

We have advised those interested in this bill that it is desirable legislation.

We are fortunate in that we feel we could function under this bill with a very reasonable budget. Section 2 would permit us to do the job assigned to us under Section 1.

The House of Representatives has twice passed a bill for the increase of the salary of the secretary and sent it to the Senate. It has never been actually rejected by the Senate. We would take this opportunity to again say that we are hampered in our work by insufficient funds to properly compensate the secretary, to purchase necessary law books and publications, to do the amount of legal research we feel is required, and to prepare and publish the reports we would like to make available to the General Court, the Governor, and the public. If we are hampered



in this fashion at present, we would be unwise to invite further responsibilities.

We can not recommend this bill unless Section 2 is restored. We think that the potential value of the Judicial Council will never be realized until we are given adequate funds with which to do our work. We recommend the following draft act:—

## 1968 DRAFT ACT

---

### AN ACT TO ENLARGE THE SCOPE AND FUNCTIONS OF THE JUDICIAL COUNCIL.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       SECTION 1. Section 34A of chapter 221 of the General Laws  
2 is hereby amended by adding at the end thereof the follow-  
3 ing:—Said council shall investigate and evaluate the reason-  
4 able needs of the judiciary on a continuing basis so as to  
5 insure that the court functions at maximum efficiency, and  
6 thereafter to recommend the necessary legislation in regard  
7 thereto.

8       The council shall engage in a continuing examination of  
9 the law of the commonwealth with a view to recommending  
10 such changes as it deems necessary to modify inequitable  
11 rules of law, to correct deficiencies which frustrate the objec-  
12 tives of the law, and to bring the law into harmony with  
13 modern conditions.

14       The council shall receive proposed changes recommended  
15 by the American Law Institute, the National Conference of  
16 Commissioners on Uniform State Laws, bar associations,  
17 judges, lawyers, members of the general court, house and  
18 senate counsel, public officials, as well as any other individu-  
19 als or groups.

1       SECTION 2. Section 34C of chapter 221 of the General Laws  
2 is hereby amended by striking out the final sentence and  
3 inserting in place thereof the following two sentences:—The  
4 secretary of said council, whether or not a member thereof,  
5 shall receive from the commonwealth a salary of ten thou-  
6 sand dollars.

7       The council shall be provided with the full-time services of  
8 a law clerk, who shall be a recent law school graduate and  
9 member of the Massachusetts bar to be selected by the  
10 secretary and to serve on an annual basis at the pleasure of  
11 the council; said law clerk to perform legal research, writing,  
12 and whatever other duties the secretary shall prescribe, at an  
13 annual salary equal to that received by the law clerks of the  
14 superior court and the supreme judicial court.

**NOTE:** On January 2, 1968, Senator James F. Burke, for the Senate committee on Ways and Means, reported, recommending that the House Bill to enlarge the scope and functions of the Judicial Council (duplicate of House, No. 4404), ought to pass. The rules were suspended, on motion of the same Senator, and the bill was read a second time and ordered to a third reading, read a third time and passed to be engrossed, in concurrence.

The legislative year ended before final action could be taken to secure enactment and the approval of the governor.

## THE JUDICIAL CONFERENCE OF MASSACHUSETTS

In 1956, the General Court authorized the creation of a Judicial Conference. In 1967, the Supreme Judicial Court took positive steps to implement this earlier legislation. (General Laws, Chapter 211, Section 3A et seq.)

By way of explanation, Section 3 of Chapter 211 of the General Laws reads as follows:—

“The supreme judicial court shall have general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue writs of error, certiorari mandamus, prohibition, quo warranto and all other writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.”

“In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C, and it may issue such writs, summonses and other processes and such orders, directions and *rules as may be necessary* for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.”

### General Laws, Chapter 211, Sec. 3C.

§ 3C. *Executive secretary; duties.* The executive secretary, subject to the direction and supervision of the justices of the supreme judicial court, shall perform the following functions and shall make reports and recommendations to the justices of the supreme judicial court relative thereto:—

(a) Examination of the administrative methods, systems and activities, relating to their offices or employment, of the judges, clerks, registers, recorders, stenographic reporters and employees of all courts of the commonwealth and the offices connected therewith.

(b) Examination of the state of the dockets of the courts, securing information as to their needs for assistance, if any, and preparation of statistical data and reports of the business of the courts.

(c) Examination of the arrangements for accommodations for the use of the courts and the clerks, registers and recorders thereof, and the examination of the arrangements for the purchase, exchange, transfer and distribution of equipment and supplies therefor.

(d) Investigation and collection of statistical data relating to the expenditures of public moneys, state, county and municipal for the operation and maintenance of the courts and the offices connected therewith.

(e) Examination, from time to time, of the operation of the courts and investigation of complaints with respect thereto

(f) Attendance to such other matters necessary to carry out the provisions of this section and sections three D, three E and three F as may be assigned by the justices of the supreme judicial court. Added St. 1956, c. 707, § 2.

### **The New Rule 3:16**

Under the provisions of general rule 3:16, the new Judicial Conference of Massachusetts:—

- (a) may consider and make recommendations on matters relating to the conduct of judicial business, the improvement of the judicial system, and the administration of justice in such manner as the Conference from time to time may deem appropriate;
- (b) may initiate and conduct legal research;
- (c) shall assist this court in coordinating the activities of the several courts;
- (d) may conduct general conferences and educational meetings.

The Conference Rule 3:16 is fully set forth in Appendix "A" at page 139 of this report of the Judicial Council.

In 1967 acting under the new rule, sub-committees of the Judicial Conference were appointed under the headings of Courts, Judicial Education, and both Civil and Criminal Procedure.

Our system of government is such that in the working out of the separation of powers, we look to the Supreme Judicial Court as the head of the judicial branch. Some have said that it is curious that the section in the Massachusetts constitution on "Judiciary Power" is shorter than the section pertaining to Harvard University in Chapter V.

It has been said that the Massachusetts constitution presumes the existence of the Supreme Judicial Court, it did not create it. The United States constitution of 1789 states that:—

### ARTICLE III

*Section 1.* "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

The Supreme Judicial Court of Massachusetts had only been in existence for five years when our constitution was established. Previously, the judicial power, such as it was, derived from the charter from England.

We can understand the operation of the supervisory power of the Supreme Judicial Court, and the role of the Judicial Conference by having reference to Article 30 of the Declaration of Rights which precedes all else (except the preamble) in our constitution of 1780.

"XXX. In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; The executive shall never exercise the legislative and judicial powers, or either of them; The judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

To preserve the separation of governmental powers under the constitution, to fulfill the role assigned to the judiciary by the people through the General Court, beginning in 1782, it is necessary for the Supreme Judicial Court to have general superintendence of all courts to prevent errors and abuses where the people have provided no other remedy. The Judicial Conference will assist the Supreme Judicial Court to exercise this superintendence.



## The Legislative Power

It should also be kept in mind that the General Court has a clearly defined power under the Massachusetts constitution, as follows:—

“The General Court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other Courts, to be held in the name of the Commonwealth, for the hearing, trying, and determining of all manner of Crimes, offences, pleas, process pliants, actions, matters, causes and things whatsoever, arising or happening within the Commonwealth, or between or concerning persons inhabiting, or residing or brought within the same, whether the same be criminal or Civil or whether the said crimes be capital or not capital, and whether the said pleas be real, personal or mixed; and for the awarding and making out of execution thereupon. To which Courts and judicatories are hereby given and granted full power and authority, from time to time, to administer Oaths or Affirmations, for the better discovery of truth in any matter in Controversy or depending before them. . . .”

Thus the General Court constitutionally possesses the power to create (and to dissolve) judicatories and courts of record. Once in existence it is the primary responsibility of the judicial branch of the government to operate the courts which have been created.

Unlike the Judicial Conference, the Judicial Council exists to observe the operation of the Judicial system. It exercises no direct supervision over that system, and it has for more than forty years advised the executive and the General Court on matters pertaining to the judicial system, and on matters of substantive law which vitally affect the commonwealth. With the creation of the Judicial Conference it will be possible for the Judicial Council to provide even more assistance to the executive and the General Court.

## Rules

The making of rules is inherently necessary in a judicial system. The power to make rules can not depend entirely on a statutory grant. If such were the case, such grant could be withdrawn and the legislative branch could attempt to exercise judicial powers either directly or indirectly by declaring that judicial business could be done only in the matter dictated by the legislative branch. This is, of course, constitutionally impossible.

Some of the important specific statutory grants of rule making power to the Supreme Judicial and Superior Courts include the power to make rules (in cases not expressly provided for by law) for simplifying and shortening pleadings, conducting trials, presenting distinctly the questions to be tried by the jury, giving a party such notice of the evidence which is intended to be offered by the adverse party as will prevent surprise and enable him to prepare for trial, remedying abuses and imperfections in practice, and diminishing costs, and for other purposes. (G.L. Ch. 213, Sec. 3)

Under this specific statutory authority, and under the inherent power of the judiciary, it is to be expected that new or revised rules will be made from time to time. There is also the general authority to issue such "rules as may be necessary or desirable for the furtherance of justice."

In those cases where such rules might come into conflict with an Act of the General Court, the Judicial Council, in liason with the General Court acting under Section 34A of Chapter 244, can consider such rules or methods and make a report to the governor and the General Court. In our 40th Report for 1964 we advised of the recent rules of the Supreme Judicial Court on Assignment of Counsel in Non-Capital cases and on the matter of Contingent Fees. We reported on Rule 15 which permitted oral discovery and we observe that Rule 15 was clearly authorized by Chapter 213, Section 3, Fifth, of the General Laws which provides:—

(The courts shall make rules etc . . . For the following purposes:—)

"Fifth, Giving a party such notice of the evidence which is intended to be offered by the adverse party as will prevent surprise and enable him to prepare for trial."

Such a rule was further authorized under the general grant of power.

We have set forth this information in our 43rd Report for the assistance of His Excellency and the members of the General Court in understanding the role and purpose of the new Massachusetts Judicial Conference, and its subcommittees.

The committee on the courts will seek to improve the administration of justice in all of our other courts. The committee on judicial education will arrange for conferences and programs to assist the judiciary in the effective and efficient discharge of judicial business.

### **Current Proposals For Rules**

On October 25, 1967, the Committee on Administration of Justice of the Massachusetts Bar Association adopted the following resolution:—

*“Resolved:—*

1. That modern and simplified rules of civil procedure conformable to the Federal Rules should be adopted by the Supreme Judicial Court for the Judicial Department.
2. That procedural statutes superseded or requiring change as a result of the adoption of the new rules should be repealed or amended by the General Court.
3. That a committee of judges, lawyers, legislators, and law professors should be appointed by the Judicial Conference to advise on the new rules prior to their adoption and thereafter on an annual basis.

A similar resolution was adopted by unanimous vote of the Civil Procedure Committee of the Boston Bar Association on October 18, 1967.

In our 16th Report for 1940 we said:—

“As a first choice, we recommend turning over *procedural* control to the courts. This will place responsibility where it belongs, and will lodge control in a body most conversant with the subject matter and best able to make speedy change when change is needed. It is assumed that the court will collaborate with bar committees, and, if the known conservatism of the legal mind is not sufficient guaranty against radical action, *it is plain that no rule could stand which invaded constitutional rights or rights accorded by substantive law.*”

## CONTINUITY OF THE COURTS IN AN ENEMY ATTACK

HOUSE . . . (1967) . . . No. 2212

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AN ACT TO AUTHORIZE CHANGES IN SESSIONS OF COURTS IN EVENT OF ENEMY  
ATTACK.

1        *Whereas*, The deferred operation of this act would tend to  
2        defeat its purpose which is to provide for continuity of govern-  
3        ment in the judicial branch in event of enemy attack, therefore,  
4        it is declared to be an emergency law, effective immediately, in  
5        the interests of the public safety.

*Be it enacted by the Senate and House of Representatives in  
General Court assembled, and by the authority of the same, as  
follows:*

1        Chapter 639 of the acts of 1950, as amended, is hereby fur-  
2        ther amended by inserting therein the following new section:—  
3        *Section 20G.* In the event that at any time enemy attack or  
4        the effects thereof, or the threat of enemy attack or the an-  
5        ticipated effects of enemy attack, shall make it imprudent, in-  
6        expedient or impossible to hold a scheduled sitting or session of  
7        any court of the commonwealth at the time or place fixed by  
8        law or by any rule of court for the holding of such sitting or  
9        session, the chief justice of said court, or in the absence thereof,  
10       the justice presiding at such sitting or session or scheduled to  
11       preside at such sitting or session, may suspend or postpone such  
12       sitting or session or may alter the time or place of such sitting  
13       or session and may order such sitting or session held at such  
14       other time or place, within or without the commonwealth, as  
15       may be appropriate and reasonable in the circumstances then  
16       existing; provided, however, that nothing contained herein  
17       shall alter the territorial or subject jurisdiction of any court of  
18       the commonwealth.

HOUSE . . . (1967) . . . No. 2213

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AN ACT TO AUTHORIZE THE JUDGES OF ANY COURT TO SIT IN OTHER COURTS IN  
EVENT OF ENEMY ATTACK.

1        *Whereas*, The deferred operation of this act would tend to  
2        defeat its purpose which is to provide for continuity of govern-



3 ment in the judicial branch in event of enemy attack, there-  
4 fore, it is declared to be an emergency law, effective immedi-  
5 ately, in the interest of the public safety.

*Be it enacted by the Senate and House of Representatives in  
General Court assembled, and by the authority of the same, as  
follows:*

1 Chapter 639 of the acts of 1950, as amended, is hereby fur-  
2 ther amended by inserting therein the following new section:—  
3 *Section 20F.* During a state of emergency declared by the  
4 governor under the provisions of section five of this act because  
5 of the occurrence of enemy attack, a justice or associate justice  
6 or special justice of any court of the commonwealth may sit in  
7 any other court of the commonwealth at the written request of  
8 the chief justice or presiding justice thereof, or in the absence  
9 of either, at the request of the senior justice present, and shall  
10 have, and may exercise, while so sitting in such other court, the  
11 full power and authority of a justice appointed to said court.

## HOUSE . . . (1967) . . . No. 2214

AN ACT TO AUTHORIZE THE DECLARATION OF LEGAL HOLIDAYS IN THE EVENT  
ENEMY ATTACK SHALL INTERRUPT THE OPERATION OF THE JUDICIAL SYSTEM.

1 *Whereas,* The deferred operation of this act would tend to  
2 defeat its purpose, which is to protect the rights of citizens in  
3 the event enemy attack shall interrupt the operation of the  
4 judicial system, now, therefore, it is hereby declared to be an  
5 emergency law effective immediately in the interests of the pub-  
6 lic safety.

*Be it enacted by the Senate and House of Representatives in  
General Court assembled, and by the authority of the same, as  
follows:*

1 Chapter 639 of the acts of 1950, as amended, is hereby fur-  
2 ther amended by inserting therein the following new section:—  
3 *Section 20H.* In the event that at any time enemy attack or  
4 the effects thereof, or the threat of enemy attack or the antici-  
5 pated effects of enemy attack, shall interrupt the conduct of  
6 the affairs of the judicial branch of the government of the com-  
7 monwealth, including, without limiting the generality of the  
8 foregoing, the holding of any sitting or session of any court or  
9 the conduct of business in the office of any clerk of court or  
10 any register of deeds or probate, the governor is authorized to

11 declare any such day on which such interruption has occurred  
12 or may reasonably be anticipated will occur, as a legal holi-  
13 day throughout the commonwealth or in any part thereof in  
14 which such interruption may have occurred or may reasonably  
15 be anticipated will occur; provided, however, that no such  
16 declaration shall be construed to require the closing of any  
17 public office which otherwise would be open for the transaction  
18 of business nor to prohibit the transaction of business by the  
19 legislative or executive departments of the government of the  
20 commonwealth or its political subdivisions and provided fur-  
21 ther that no such declaration shall be construed to prohibit the  
22 transaction of any other lawful business on such day.

These bills were introduced at the request of the Massachusetts Director of Civil Defense and others.

Elsewhere in this report (page 32) we have set forth the provisions of Chapter 211 Section 3 of the General Laws, as amended in 1956, which re-affirms the unlimited superintendence of all inferior courts by the Supreme Judicial Court.

Professor Charles Fairman of Harvard Law School mentioned this 1956 amendment in the following terms:—

“In the main, these ends (i.e. the continuity of the Judicial System) would best be attained by a statute vesting a large order-and rule-making power in the State’s highest court. In 1956 the Massachusetts Legislature widened the statute on superintendence of inferior courts by an amendment giving the Supreme Judicial Court a general superintendence, including authority to issue such orders, directions and rules as may be desirable for the furtherance of justice or for securing proper and efficient administration. The needs of war in this regard are akin to the peacetime need for making the administration of justice more rational, more flexible, and responsive to an evolving society.”

It is our opinion that the Supreme Judicial Court has the power to deal with an enemy attack, including an H-Bomb. We do not believe that any definite orders, directions and rules have been made as yet, and the resolve requesting an investigation of this matter by us points up the necessity for us to make a recommendation to the Judicial Conference that this subject be referred to the sub-committee on the Courts for preparation of appropriate plans.

We can also make the observation that the physical problem of insurance that the Supreme Judicial Court would survive an enemy attack should receive attention.

In a recent article in the *Journal of the American Judicature Society* (Vol. 47, No. 10 p. 213), Edward A. McDermott, (speaking as Director of the Office of Emergency Planning in the Executive Office of the President) cited that if federal, state, and local governments are not prepared to govern after a disaster, martial law would take over. McDermott cited a U. S. Supreme Court decision:—

“But the term “martial law” carries no precise meaning. The Constitution does not refer to “martial law” at all and no Act of Congress has defined the term. . . . In 1857 the confusion as to the meaning of the phrase was so great that the Attorney General in an official opinion had this to say about it: “The common law authorities and commentators afford no clue to what martial law, as understood in England, really is. . . . In this country, it is still worse.” (8 Op. Atty. Gen. 365, 367, 368.) What was true in 1857 remains true today.”

*Duncan v. Kahanamoku*, 327 U. S. 304 (1946)

This was a case which took place at Hawaii after December 7, 1941. The U. S. Supreme Court released two defendants convicted by a military court one of assault on sentries, and embezzling stock by the other. In the same case the U. S. Supreme Court held that the concept of martial law was “not intended to authorize the supplanting of the courts by military tribunals.”

In the Declaration of Rights in the Massachusetts Constitution it is provided that no person can be subjected to martial law (of the Commonwealth) but by the authority of the legislature. (Art. 28 of the Dec. of Rights).

McDermott explained that planning for all three branches of government was necessary if martial law was to be avoided. Possibly the problem of the judiciary is still as vexing as any. In the Appendix to Chapter 33 of the General Laws, we have provided statutory authority for continuity of government as follows:—

*Sec. 13-20A. Designation of successors by department heads.* The commissioner or head of each executive or administrative department of the commonwealth, including the state secretary, the attorney general, the treasurer and receiver-general, and the auditor, and the director or head of each

division in each such department, shall designate, by name or position, five persons in his respective department or division who shall exercise, successively, his duties in the event of his absence or disability. Each such designation shall be subject to approval by the governor and council and shall be in effect until revoked by the officer who made such designation. Persons designated under this section to perform the duties of a department or division head in his absence or disability shall perform such duties only in succession to persons so authorized under any other provision of general or special law. Added St. 1962, c. 767.

*Sec. 13-20B. Vacancies; manner of filling.* Any vacancy in any office which, by reason of the provisions of any statute, is to be filled by the governor, with the advice and consent of the council, may, in the event of a vacancy therein resulting from enemy attack and in the event that enemy attack or the effects thereof prevents a quorum of the council from assembling, be filled by the governor without the advice and consent of the council. Any appointment made under the authority of this section shall be temporary, pending appointment in the usual manner, with the advice and consent of the council, when circumstances shall permit. Added St. 1962, c 767.

*Sec. 13-20C. Removals.* Any officer, who, by reason of the provisions of any statute, may be removed by the governor, with the advice and consent of the council, may, in the event that enemy attack or the effects thereof prevents a quorum of the council from assembling, be removed by the governor without such advice and consent, provided that the removal is for grounds that would be grounds for removal with the advice and consent of the council. Any removal made under the authority of this section shall be temporary, pending removal in the usual manner, with the advice and consent of the council, when circumstances shall permit. Pending such removal with the advice and consent of the council, the governor may fill any vacancy resulting from a removal effected under the authority of this section, by appointment thereto without the advice and consent of the council. Added St. 1962, c. 767.

## Standby Judges

There appears to be no specific mention of judicial succession. In his study of this problem, Mr. McDermott said:—

*"Judicial Succession.* The continued operation of a judicial system involves many things. But one thing is basic and certain — courts can function only if there are judges with authority to act. If a judge becomes a casualty or is otherwise unavailable, it is necessary to have substitutes ready to exercise the powers and discharge the duties of the office. In order to designate such substitutes and clothe them with legal authority to act, emergency legislation must be enacted.

The obvious need for emergency legislation for the judicial as well as the executive and legislative branches of the state and local governments prompted



the Office of Emergency Planning to have legislation prepared for consideration by the states. A number of statutes have been drafted.<sup>7</sup> This legislation has the support of the Conference of Chief Justices which has recognized the importance of such legislation in the following resolution.

THEREFORE, BE IT RESOLVED that the Conference of Chief Justices . . . recommend to state legislatures the careful consideration of legislation to assure the continuity of civilian government — judicial, legislative and executive.

One of the aforementioned statutes is "The Emergency Interim Executive and Judicial Succession Act." The objective of the judicial succession provisions of this statute is to provide adequate legal authority for the designation of *standby judges* in state and local courts. The *standby judges* would be called "special emergency judges" and would be authorized to perform the functions of the judiciary under post-attack conditions. This type of legislation is necessary because judicial power may be conferred only by authority of law. A person other than the regular judge may exercise the judicial functions of the judge whenever the grounds provided for by law exist."

A proposal for a Judicial Succession Act reads as follows:—

I

*Special Emergency Judges:* In the event that any judge of any court is unavailable to exercise the powers and discharge the duties of his office, and in the event no other judge authorized to act in the event of absence, disability or vacancy or no special judge appointed in accordance with the provisions of the constitution or statutes is available to exercise the powers and discharge the duties of such office, the duties of the office shall be discharged and the powers exercised by the special emergency judges hereinafter provided for:

(a) The Governor, upon approval of this Act, shall designate for each member of the Supreme Court special emergency judges in the number of not less than three nor more than seven for each member of said Court and shall specify their order of succession.

(b) The Chief Justice of the Supreme Court in consultation with the other members of said Court, upon approval of this Act, shall designate for each Court of record except the Supreme Court, special emergency judges in the number of not less than three nor more than seven for each judge of said Courts and shall specify their order of succession.

(c) The Judge of the Circuit Court (or the presiding or senior judge of a circuit in consultation with the other judges of that circuit where there is more than one judge), upon approval of this Act, shall designate not less than three special emergency judges for Courts not of record within that circuit and shall specify their order of succession.

Such special emergency judges shall, in the order specified, exercise the powers and discharge the duties of such officer in case of the unavailability of the regular judges or judges or persons immediately preceding them in the designation. The designating authority shall review and revise, as necessary, designations made pursuant to this Act to insure their current status.

Said special emergency judges shall discharge the duties and exercise the powers of such office until such time as a vacancy which may exist shall be filled in accordance with the constitution and statutes or until the regular judge or one preceding the designee in the order of succession becomes available to exercise the powers and discharge the duties of the office.

## II

*Formalities of Taking Office:* At the time of their designation, special emergency judges shall take such oath as may be required for them to exercise the powers and discharge the duties of the office to which they may succeed. Notwithstanding any other provision of law, no person, as a prerequisite to the exercise of the powers or discharge of the duties of an office to which he succeeds, shall be required to comply with any other provision of law relative to taking office.

## III

*Period in Which Authority May be Exercised:* Special emergency judges are empowered to exercise the powers and discharge the duties of an office as herein authorized only after an attack upon the United States, as defined herein, has occurred. The Legislature, by concurrent resolution, may at any time terminate the authority of said special emergency judges to exercise the powers and discharge the duties of office as herein provided.

## IV

*Removal of Designees:* Until such time as the persons designated as special emergency judges are authorized to exercise the powers and discharge the duties of an office in accordance with this Act, said persons shall serve in their designated capacities at the pleasure of the designating authority and may be removed or replaced by said designating authority at any time, with or without cause.

It would seem to us that there should be further legislative study of such a proposal.

In 1959, the Legislative Research Council made a report (Senate No. 520 of 1959) entitled "Succession and Continuity in State and County Government". This report did not deal at length with the Judiciary but did recommend constitutional amendment:

Also in 1960, a constitutional amendment was proposed as follows:—

*Article of Amendment.* The General Court, in order to insure continuity of the government of the commonwealth and the governments of its political subdivisions in periods of emergency resulting from disaster caused by enemy attack, shall have full power and authority to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and to adopt such other measures as may be necessary and proper for insuring continuity of the government of the commonwealth and the governments of its political subdivisions. In the exercise of the powers hereby conferred the general court shall in all respects conform to the requirements of this constitution except to the extent in the judgment of the legislature so to do would be impracticable or would result in undue delay. Nothing contained herein shall authorize any measure infringing upon the rights secured to the people by Articles I to XXX, inclusive, of Part the First of the Constitution of the Commonwealth."

In 1960 the General Court, by Chapter 38 of the Resolves of 1960, requested the Judicial Council to investigate the matter of the continued operation of the judicial system in the event of an enemy attack upon or affecting the commonwealth of Massachusetts.

In the same year by Chapter 55 of the Resolves of 1960, a special commission was authorized to make an investigation and study relative to the continuation of state and local government in the event of an ATOMIC attack. This commission was to report on all three branches, legislative, executive and judicial, and the continuation of the function of each in the event of an atomic attack.

We have considered the present proposals for legislation and report as follows:—

### HOUSE 2212 OF 1967

The first of these bills would merely permit the justice of the court to deal with the postponement, or cancellation of the court session scheduled and would allow it to be held at whatever place might be appropriate.

Here again, it would not appear that such legislation would do more to provide for continuity of the judicial system than a rule or order of the Supreme Judicial Court.

Authority for such suspension, postponement, or transfer of

business to another place is already found in Section 3 of Chapter 211.

If there is any possible question on the matter, it would be extremely simple for the General Court to simply add the words "or in the event of enemy attack, threat of attack, major catastrophe, or mass disaster," to section 3 of Chapter 211. If this is desirable we recommend the following draft act which would cover House 2212, 2213, and 2214 of 1967:—

### 1968 DRAFT ACT

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*Be it enacted etc.*

1 SECTION 1. Chapter 211 of the General Laws, as most recently  
2 amended by Chapter 707 of the Acts of 1956 is hereby further  
3 amended by adding after the words "the improvement of the admin-  
4 istration of justice", in first sentence of the second paragraph,  
5 the words "or in the event of enemy attack, threat of attack,  
6 major catastrophe, or mass disaster".

We do not recommend House (1967) No. 2213 since a plan for the re-assignment of justices under the conditions set forth in the bill can be prepared by the Supreme Judicial Court and promulgated by a general rule.

### HOUSE 2214 OF 1967

The third bill (House 2214 of 1967) presents us with an interesting speculation. It would allow a governor, who might not be the governor elected by the people, to declare a legal holiday(s) ONLY so far as the judiciary was concerned. In lines 15 to 20 inclusive it would appear that the transaction of business by the legislative of executive departments of government would continue but the Judiciary would have its hands tied.

*There is no limit to the number of holidays which could be declared.*

We are certain that the sinister aspects of this proposal never occurred to the proponents. How the judicial system might function after a nuclear catastrophe, we do not even guess. We



do know that where, and when it can function, it will bring whatever measure of justice that may be possible. It will deter complete dictatorial government. It will adapt and it will begin again.

Should the Governor declare a state of emergency, it would be absurd to assume that the judge would operate in some sort of vacuum unaware that things were getting sticky.

As there is no value to this particular bill (House 2214) we oppose it.

We discussed the constitutional aspects of this type of legislation in our 36th Report in 1960 at pages 87-98 inclusive. We then set forth the relevant sections of the Massachusetts constitution which seemed to apply. The whole problem of continuity of government requires further attention, but as we pointed out in 1960, we can not undertake the matter at this time.

## III. CIVIL PRACTICE AND PROCEDURE

### Directed Verdicts

HOUSE . . . (1967) . . . No. 2019

---

AN ACT REQUIRING A RULING ON A MOTION FOR A DIRECTED VERDICT IN CIVIL PROCEEDINGS WITHOUT WAIVING THE RIGHT TO INTRODUCE FURTHER EVIDENCE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 231 of the General Laws is hereby amended by  
2 inserting after section 120 the following section:—  
3 *Section 120A.* The defendant in a civil action shall be  
4 entitled, as a matter of right, to a ruling upon his motion for  
5 a directed verdict or upon his request for a ruling that the  
6 evidence is insufficient to warrant a finding for the plaintiff,  
7 upon the close of the plaintiff's case. A denial of such motion  
8 or request shall not bar the offering of further evidence by the  
9 defendant, whether or not he has reserved the right to do  
10 so.

During a civil trial, such as an automobile case, and at the close of the evidence presented by the plaintiff, counsel for the defendant may offer a motion that the judge direct the jury to give a verdict for the defendant.

The reason for such a motion is that, in the opinion of the defense counsel, the evidence offered, assuming all of it is believed, would not, as a matter of law, justify the jury in finding for the plaintiff.

If the plaintiff did not prove he owned the damaged vehicle, he could not recover. If he showed an accident and proved no injury, he could not recover. There are innumerable examples possible. Here we have a failure to prove the case.

In dealing with the motion for directed verdict, the court may refuse to rule immediately, and hold the motion in abeyance while the trial continues.

If there is a "fatal" variance between the case set forth in the pleadings and the facts proved, a directed verdict is in order. If no cause of action is alleged in the pleadings, then a directed

verdict is in order. Where the defendant proves a complete defense, a motion for directed verdict is in order.

The moment of truth is indeed reached when the motion for a directed verdict is filed because *the defendant must rest his case*. Thus, for the defendant, the directed verdict motion is a calculated risk. If such a move is planned in advance, the defense counsel will not cross-examine as fully as in other cases on the premise that evidence might be forthcoming which would be inconsistent with his position.

We recommend this bill.

The Federal Rules of Civil Procedure include a similar rule which is as follows:—

### RULE 50(a)

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

“(a) *Motion for Directed Verdict: When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. As amended January 21, 1963, eff. July 1, 1963”.

### Agreements for Continuance

HOUSE . . . (1967) . . . No. 4714

AN ACT PROHIBITING THE ENTRIES OF NONSUITS, DISMISSALS OR DEFAULTS IN ANY CIVIL ACTION IF THE PARTIES AGREE THAT THE CAUSE BE CONTINUED.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 Chapter 231 of the General Laws is hereby amended by
- 2 inserting after section 58A the following section:—

3        *Section 58B.* No order of a nonsuit, dismissal or default  
 4        shall be made by any court in any civil action if all the  
 5        parties to the proceedings have agreed, in writing and filed  
 6        with the court, that the cause be continued.

It is not in the interest of justice to permit counsel for the parties to substitute a private agreement for the rules of court. With the backlog of cases which faces all of our courts, we feel that any attempt to delay the disposition of a case should not be encouraged.

One might draw an incorrect conclusion from this bill. A person who was not familiar with judicial proceedings might be led to believe that our courts will not honor agreements of counsel or the parties.

In almost every instance, the judge will sanction agreements of counsel to waive procedural rules, and to continue the case from time to time. However, it is necessary for the court to have the exclusive ultimate authority over the case. When that time comes when the parties can not show any sound reason for a further continuance, the case should be turned out of court. There is no other sensible procedure possible. The parties could continue a case until a new judge was appointed, or until one of them went around the world, or until the rights of third persons went by the boards.

We simply can not countenance any amendment to the practice act which would prevent the judge from being master in his own house. Nonsuits, dismissals, and defaults are rectified and removed almost wholesale, and for reasons which some contend are even trivial. There is no abuse existing here, nothing to reform, and we unequivocally oppose this bill.

## DISCOVERY BY INTERROGATORIES

# HOUSE . . . (1967) . . . No. 2203

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### AN ACT RELATING TO THE FILING OF INTERROGATORIES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1        SECTION 1. Chapter 231 of the General Laws is hereby  
 2        amended by striking out section 61 and inserting the following  
 3        section:—



4        *Section 61.* Any party, after the entry of a writ or the filing  
5 of a bill or petition, may interrogate an adverse party regarding  
6 any matter not privileged, which is relevant to the subject mat-  
7 ter involved in the pending proceeding, whether it relates to the  
8 claim or defense of the interrogating party including the exist-  
9 ance, description, nature, custody, condition and location of any  
10 books, documents or other tangible things and the identity and  
11 location of persons having knowledge of relevant facts. It is not  
12 ground for objection that the answers will be inadmissible at the  
13 trial if the information sought appears reasonably calculated to  
14 lead to the discovery of admissible evidence. The interrogating  
15 party shall not require the production or submission for inspec-  
16 tion of any writing, plan, recording, model, photograph, or other  
17 thing prepared by or for the adverse party, his attorney, surety,  
18 indemnitor, or agent in anticipation of litigation or in prepara-  
19 tion for trial unless the court otherwise orders on the ground that  
20 a denial of production or inspection will result in an injustice or  
21 undue hardship; nor shall the adverse party be required to pro-  
22 duce or submit for inspection any part of a writing which re-  
23 flects an attorney's mental impressions, conclusions, opinions, or  
24 legal theories, or, except as provided in section seven (b) the con-  
25 clusions of an expert. The adverse party may not be interro-  
26 gated on or be required to produce for inspection any liability  
27 insurance policy or indemnity agreement unless such policy or  
28 agreement would be admissible in evidence at the trial of the  
29 action.

1        SECTION 2. Section 63 of said chapter 231 is hereby amended  
2 by striking out, in the first sentence, the words "nor to disclose  
3 the names of witnesses, except that the court may compel the  
4 party interrogated to disclose the names of witnesses and their  
5 addresses if justice seems to require it, upon such terms and con-  
6 ditions as the court deems expedient".

The purpose of this bill, according to the information avail-  
able to the Judicial Council, is to place written interrogatories  
on the same basis as Oral depositions which are now provided  
for under Rule 15 of the Rules of the Supreme Judicial Court.

The proposed legislation is based largely on Rule 26 (b) of  
the Federal Rules of Civil Procedure which is *one of several*  
rules in the Federal courts which is applicable to *discovery* by  
oral and written questions.

We would like to stress to the General Court that the sel-  
ection of *individual sections* of the Federal Rules of Civil  
Procedure for introduction into the Massachusetts "Prac-  
tice Act", Chapter 231, is not to be encouraged.

The reason for this is because the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are comprehensive interlocking and inter-related sets of procedural rules which are intended to govern judicial proceedings from the strict procedural point of view.

Isolation of one rule or one section of a rule and the recommendation that this one rule or section, however effective it might seem, be a law in Massachusetts will often create more problems than it will solve.

Rule 33 of the Federal Rules of Civil Procedure provides among other things:—

“Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.”

As can be seen by a reading of rule 26 (b), the scope of written interrogatories under the federal rule is much broader than under the rule in effect in Massachusetts.

Rule 26 (b) provides as follows:

“(b) *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.”

We should first note that the Federal rule allows for DISCOVERY of matters before trial, and answers are required in writing regardless of whether or not such answers would be admissible at trial.

**Interrogatories as Evidence**

Under the present practice in Massachusetts courts, the interrogatories and their answers are admissible during a trial. For this reason counsel very often refuse to answer an interrogatory question which seeks information which would not be admissible at trial. Lawyers are familiar with the rather impressive body of law in Massachusetts which is applicable to interrogatories.

If the proposed legislation were enacted, interrogatories could no longer be used during trial as is now the case. The purpose of written interrogatories would be changed from one which seeks to introduce legally admissible evidence into the case for all purposes to one which seeks to permit the parties to obtain discovery of facts before trial. We do not necessarily condemn the latter purpose but to accomplish it far more must be done than the mere enactment of House 2203 of 1967.

We would also point out that such a proceeding would not readily lend itself to use in the District Courts. Cases in the District courts are generally not of a magnitude to call for full scale discovery techniques. At present the basic elements of the interrogatory section of Chapter 231 Sec. 61 are:—

“Any party, after the entry of a writ or the filing of a bill or petition, may interrogate an adverse party for the discovery of facts and documents admissible in evidence at the trial of the case. No party shall file as of right more than thirty interrogatories . . . . .”

This procedure is applicable to all courts at the present time and while it has many defects it serves the routine case fairly well.

We do not recommend the enactment of this legislation.

**IMPLEADER**

**HOUSE . . . (1967) . . . No. 2022**

AN ACT RELATIVE TO THE PERSONS WHO MAY BE JOINED BY IMPLEADER.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Section 4B of chapter 231 of the General Laws, as added by  
2 chapter 696 of the acts of 1964, is hereby amended by striking  
3 out the first sentence and inserting in place thereof the  
4 following sentence:—Before the filing of his answer, or  
5 within thirty days thereafter, a defendant, on notice to  
6 plaintiff, may, as third-party plaintiff, enter a writ and have  
7 served a summons and third-party declaration upon a person  
8 who is or may be liable to him for all or part of the plaintiff's  
9 claim against him.

10 The said section four B of chapter two hundred and thirty-  
11 one of the General Laws is further amended by striking out  
12 the fifth sentence and inserting in place thereof the following  
13 sentence:—A third-party defendant may proceed under this  
14 section against any person who is or may be liable to him for  
15 all or part of the claim made in the action against the third-  
16 party defendant, and subsequent parties defendant may,  
17 likewise, proceed under this section against persons who may  
18 in turn be liable to such subsequent parties defendant for all  
19 or part of the claims made against such subsequent parties  
20 defendant.

We recommend this bill.

This is a technical change in the procedure for bringing a party into a lawsuit who may be liable for all or part of the claim that is being made.

It should be the aim of the procedural statute (here, Chapter 231, Sec. 4 B) to join in one action — that is in one case — all of the parties who have a claim as well as all those against whom such a claim is being made.

In the Federal Rules of Civil Procedure (Rules 20 and 22) it is permitted to collect together in one lawsuit all of the parties who have a right to relief by reason of one transaction. In addition all defendants involved in one action may be joined. Under Rule 22 of the Federal Rules, such persons as may have a claim against the plaintiff may be joined as defendants and they may be required to bring in other parties by interpleader.

Under the present provisions of Section 4 B of Chapter 231, the original plaintiff sues the original defendant. The original defendant, being of the opinion that if he is found liable, he has a claim on another, can implead that other in the case as a third party defendant. The third party is thus brought into the one case so that the rights of all can be settled.

The third party defendant can, in turn, bring in other "third party" defendants *but* because of the existing language of Sec-



tion 4 B, none of these added “third party” defendants can make a claim against the original defendant or the original plaintiff for the simple reason that the original parties to the case are excluded from the arrangement.

Thus under existing law, you can only implead one who is “*not a party to the action.*”

These important words, viz “*not a party to the action*” should be stricken from Section 4 B of Chapter 231 in order to allow impleader in cases where it would be useful, and where it can not be used because of the restriction in the statute.

PROBATE COURTS SEPARATE SUPPORT

HOUSE . . . (1967) . . . No. 1455

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AN ACT TO AMEND THE REQUIREMENTS FOR THE FILING OF A PETITION FOR SEPARATE SUPPORT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1     Section 32 of chapter 209 of the General Laws is hereby
- 2     amended to read as follows:—*Section 32.* If a husband fails
- 3     without justifiable cause to provide suitable support for his
- 4     wife, or deserts her, or if the wife has justifiable cause for living
- 5     apart from her husband, or if the husband is deserted by his
- 6     wife or has justifiable cause for living apart from his wife,
- 7     whether or not he or she is actually living apart, the probate
- 8     court may, upon his or her petition, or if he or she is incom-
- 9     petent due to mental illness or mental retardation, upon peti-
- 10    tion of the guardian or next friend, prohibit the husband or
- 11    wife from imposing any restraint on the personal liberty of
- 12    the other during such time as the court by its order may direct
- 13    or until further order of the court thereon and upon the applica-
- 14    tion of the husband or wife or of the guardian of either the court
- 15    may make further orders relative to the support of the wife and
- 16    the care, custody and maintenance of their minor children, may
- 17    determine with which of their parents the children or any of
- 18    them shall remain and may, from time to time upon similar
- 19    application revise and alter such order or make a new order or
- 20    decree as the circumstance of the parents or the benefit of the
- 21    children may require.
- 22    Upon request by the court, state police, local police or pro-
- 23    bation officers shall make an investigation in relation to any
- 24    proceeding hereunder and report to the court. Every such re-
- 25    port shall be in writing and shall become part of the records of
- 26    such proceedings.

We recommend this bill.

The changes suggested by this legislation are:—

(1) In a case where the wife is still living in the same house with the husband, but has justifiable cause for living apart from him, the court may make an order forbidding the husband to interfere with the personal liberty of the wife, and an order for custody of the children and orders for support. The husband would have a similar right.

(2) In the existing statute there is reference to *insanity* as a ground for action by the probate court for the protection of one of the spouses and the children. The proposed amendment would change this word to "*mental illness or mental retardation.*"

Under existing law, the offended spouse must be actually out of the house living apart from the husband if she wishes the court to make an order restraining him from interfering with her, and an order for the support of herself and the children.

The proposed bill would allow the court to act where it was demonstrated that although there was actual cause existing why the wife was entitled to live apart from the husband, she could not do so for financial or other reasons. In effect, the wife would not have to move out to get an order from the Probate Court.

The necessity for the second amendment is more obvious as we learn more about mental illnesses. The amendment is remedial and will make it more practical for the Probate Courts to act in such cases. The law in these instances is permissive and not mandatory and the final discretion rests with the Probate judge.

## A VARIETY OF PROPOSALS

# HOUSE . . . (1967) . . . No. 3452

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AN ACT RELATIVE TO THE IMPROVEMENT AND MODERNIZATION OF COURT PROCEDURES, AND THE CREATION OF AN APPELLATE DIVISION.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 SECTION 1. Services of a summons or writ of complaint
- 2 must be accompanied by a copy of the declaration or bill of

3 complaint. When no attachment or restraining order is  
4 sought services in hand can be made by the attorney or a  
5 disinterested party who shall so state on the back of the writ  
6 under the pains and penalties of perjury.

1 SECTION 2. No court hearing civil or equity cases shall  
2 appoint an auditor or master without the written consent of  
3 the parties, and then only after a pretrial.

1 SECTION 3. All parties in any action, civil, equity or  
2 criminal, may submit their case on agreed statement of facts  
3 in writing at any time.

1 SECTION 4. No person shall be exempt from jury duty  
2 except an individual with a criminal record, a mother with  
3 children under sixteen years of age, or an individual whose  
4 reason in writing has been accepted by the trial judge.

1 SECTION 5. No judge of a court whose jurisdiction exceeds  
2 one hundred thousand in population shall practice law or be  
3 associated with any law firm.

1 SECTION 6. In any court, during trial of civil, equity or  
2 criminal cases no witness shall be present except the parties  
3 and the witness testifying.

1 SECTION 7. In the superior court, in civil and equity cases,  
2 within thirty days after an answer, demurrer or any other  
3 pleading is filed, the plaintiff and the defendant shall each file  
4 interrogatories and notice to admit facts; the defendant shall  
5 file within thirty-five days. The court shall determine by rule  
6 when the interrogatories and the notice to admit facts have  
7 been fully and finally answered. Once the interrogatories and  
8 the notice to admit facts have been fully and finally  
9 answered, the case shall automatically be placed on a pretrial  
10 list. When reached for the pretrial, the attorneys for the  
11 respective parties shall give the pretrial judge a written  
12 statement of the facts of the case together with an affidavit or  
13 affidavits from the respective parties detailing in a summary  
14 manner the truth of the case or defense. If the case is not  
15 settled, the pretrial judge shall designate the issues and order  
16 the case ready for trial. The interrogatories and the notice to  
17 admit facts together with the answers may be introduced at  
18 the trial as provided by law. The respective affidavits shall be  
19 part of the record for consideration at all stages of the case. If  
20 at the pretrial or before trial, the veracity of the affidavits is  
21 questioned, the attorney or party questioning the affidavits  
22 may cause the affiant and other witnesses to be summoned to  
23 his office or a court house with the affiant's attorney present  
24 and before an approved court stenographer examine the

25     affiant and other witnesses. If after examination the parties  
26     do not agree on their differences the record shall be presented  
27     to the pretrial judge who shall, subject to exceptions, order  
28     such correction, addition or elimination as he may deem just  
29     and proper. Such correction, addition or elimination together  
30     with the exceptions shall be entitled "Supplement to the  
31     Affiant's Original Affidavit."

1     SECTION 8. Each party's affidavits and the attorneys'  
2     statements to be presented to the pretrial judge, except for  
3     written papers or documents involved in the case, shall not  
4     exceed fifteen eight and one half by thirteen sheets, typed  
5     double space on one side only.

1     SECTION 9. Once the case is on the pretrial list, any paper  
2     or document filed by any of the parties shall be accompanied  
3     by a fee of one dollar, plus such other fees required by law or  
4     order of the court.

1     SECTION 10. There shall be trials by juries only in the  
2     superior court. After a civil or an equity case has been  
3     pretried and the issues therein designated, if no jury is  
4     claimed or required, the pretrial judge may send said civil or  
5     equity case to the probate court of the county in which the  
6     case was started or to the district court in which said case  
7     could have been started. Subject to appeal, exceptions or  
8     report to the appellate division of the superior court, said  
9     case shall be tried in said probate court or district court as if  
10    originally commenced therein. Said probate or district courts  
11    hearing said cases shall have the same powers as those held  
12    by the superior court.

1     SECTION 11. There shall be an appellate division of the  
2     superior court for the rehearing of matters of law arising in  
3     civil, equity and criminal cases therein. Said division shall  
4     consist of panels of three judges of said court. Said judges are  
5     to be designated in rotation by the chief justice of said court.  
6     Each panel is to sit for not more than thirty days, and no  
7     judge is to sit on consecutive panels.

1     SECTION 12. The time and manner of preparing the papers  
2     for the appellate division shall be in accordance with section  
3     one hundred and thirty-five of chapter two hundred and  
4     thirty-one of the General Laws, as if preparation were for the  
5     supreme judicial court, except that the papers need not be  
6     printed. The appeal, bill of exceptions or report shall be filed  
7     with a fee of ten dollars with the clerk in the county in which  
8     the case originated. Said clerk shall forward the same to the  
9     superior court clerk of Suffolk county. Said appellate division,  
10    subject to appeal and review by the supreme judicial court,



11 shall have the same powers as those held by the supreme  
12 judicial court to arrive at a final decision.

1 SECTION 13. An appeal to the supreme judicial court shall  
2 lie from the final decision of the appellate division of the  
3 superior court. Claims of appeal shall be filed with the clerk  
4 of the county in which the case originated within ten days  
5 after notice of the appellate division's final decision. Printing  
6 of the appeal and all pertinent papers shall be in accordance  
7 with section one hundred and thirty-five of chapter two  
8 hundred and thirty-one of the General Laws.

1 SECTION 14. All actions shall be taken to the supreme  
2 judicial court by way of appeal. At any stage, in any court,  
3 no action shall be dismissed for any error in procedure unless  
4 the erring party has failed to make the necessary correction  
5 within ten days after notification of such error.

1 SECTION 15. Any judge of the superior court may send any  
2 case to the probate or district courts in the respective  
3 counties or judicial district for pretrial. There said case is to  
4 be pretried and the issues designated. If the case is not settled  
5 at said pretrial and a jury trial is required said case shall go  
6 back for trial on the designated issues, otherwise said case  
7 shall remain in the probate or district court for trial as if it  
8 had been originally started there, with the right to go to the  
9 appellate division of the superior court by way of appeal, bill  
10 of exceptions or report.

The several suggestions for improvement and modernization of court procedures which are contained in House (1967) 3452 could probably be better described as objectives rather than concrete legislative proposals. These objectives are easy to set forth but difficult to attain. Although we do not recommend this bill, the following comments may be of assistance to the General Court.

*Section 1.* The practice of serving a copy of the declaration or complaint with the writ is followed in the Federal Courts and in many state courts. It has never been the practice in Massachusetts. In cases where an attachment is made the defendant may have a copy of the declaration within three days, on written demand.

*Section 2.* In Equity cases, it is inherent that the court shall have the power to appoint a Master to hear the evidence without

the consent of the parties, and even over their objection. This power should survive any rule change. The power to appoint an auditor without consent of the parties is a power which the court must retain for the foreseeable future.

*Section 3.* To some extent, in civil cases and in Equity cases, the parties may now submit their cases on agreed statements of fact in writing. This suggestion assumes that such a thing is not done. The reason why it is not done more often is that few cases can be decided in such fashion. We cannot see how a criminal case (except the most simple one) could be handled in this manner as a practical matter.

*Section 4.* To the extent that all citizens who are capable and competent should serve as jurors, we concur in the suggestion. We doubt that this provision adds very much to our existing law.

*Section 5.* It is the hope of all concerned with the administration of justice that full time judges will be adequately compensated and sufficiently busy with their judicial duties so that the private practice of law would not be possible.

*Section 6.* Sequestration of witnesses during a trial can be ordered by the judge for adequate reasons at the present time. There is no particular need to make this mandatory.

*Section 7, 8, 9.* Since the beginning of English law, and undoubtedly even in ancient times, all of those concerned with the trial of controversies have been interested in defining the issues to be decided. Were this the best of all possible worlds, the proposal set forth might be considered. Experience of some centuries indicates that the proposal would best serve as a model of perfection.

*Sections 10-15.* These sections deal mainly with a proposal for an appellate division in the superior court. Elsewhere in our 43rd Report, we have discussed this proposition.

## IV. CRIMINAL LAW AND PROCEDURE

### Arrest Without A Warrant

## HOUSE . . . (1967) . . . No. 1851

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AN ACT AUTHORIZING THE ARREST WITHOUT WARRANT IN HIT AND RUN CASES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Section 21 of chapter 90 of the General Laws is hereby
- 2 amended by inserting before the last clause in the first
- 3 sentence thereof, the following clause:—, or any person who
- 4 operates a motor vehicle upon any way or in any place to
- 5 which members of the public have a right of access as invitees
- 6 or licensees, without stopping and making known his name,
- 7 residence, and the register number of his motor vehicle, goes
- 8 away after knowingly colliding with or otherwise causing
- 9 injury to any person,

## SENATE . . . (1967) . . . No. 459

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AN ACT AUTHORIZING A POLICE OFFICER TO ARREST A PERSON FOR UTTERING A FALSE PRESCRIPTION TO PROCURE DRUGS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 In General Laws Chapter 94, Section 187D. Penalty for
- 2 Violation of SS. 186. Amend said section by adding after the
- 3 word “alters” the words “or utters”. Also add the following
- 4 paragraph:—
- 5 “Any police officer who has probable cause to believe that
- 6 a person is violating any provision of this section shall detain
- 7 or arrest said person without the necessity of obtaining a war-
- 8 rant and seize such drugs.”

# SENATE . . . (1967) . . . No. 460

AN ACT AUTHORIZING A POLICE OFFICER TO ARREST CERTAIN PERSONS WHO ARE SUSPECTED OF BEING IN ILLEGAL POSSESSION OF HARMFUL DRUGS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 In General Laws Chapter 94, Section 178B. Illegal Possession
- 2 of Certain Harmful Drugs Penalized. Amend said section
- 3 by adding the following paragraph —
- 4 “Any police officer who has probable cause to believe that
- 5 a person is violating any provision of this section shall detain
- 6 or arrest said person without the necessity of obtaining a
- 7 warrant and seize such drugs.”

## **We Recommend Again that the Police be Authorized to Make Arrests Without a Warrant for Misdemeanors Committed in their presence.**

Since 1964 the Judicial Council has continually urged that police officers be given authority to arrest and detain persons who commit a misdemeanor in their presence, regardless of whether or not there is a breach of the peace.

The present law pertaining to misdemeanor arrests is derived from the common law. Well before the present series of constitutional decisions by the United States Supreme Court relating to arrests, the trend was to broaden the authority of the police to arrest without a warrant. In probably two-thirds of the states of the United States, the police have authority to arrest for a misdemeanor committed in their presence which does not involve a breach of the peace.

Legal authorities and writers have urged that the police be given wide arrest powers in misdemeanor cases for at least a generation. One of the arguments is based on the lack of real distinctions between misdemeanors and felonies in many instances. The inability of the officer to make an arrest for a serious misdemeanor is something which contributes to the general lawless attitude which is now reaching scandalous proportions.

The general court has recognized that the officer must be given additional authority to arrest without a warrant in the case of (1) glue sniffing, (2) certain gaming and gambling, (3) minors



transporting alcoholic beverages, and (4) offenses concerning false liquor purchase identification cards. In the last two sessions of the legislature, these misdemeanors, none of which involve a breach of the peace, have been put on the list of cases where no warrant is necessary.

The "Uniform Arrest Act" which was drawn up in 1942 provides in Section 6 that a police officer may arrest for misdemeanors *not* committed in his presence if the officer believes the offender will not be apprehended unless an immediate arrest is made. This proposal, which is one made a generation ago, goes far beyond what we have recommended.

Some have objected to misdemeanor arrests without a warrant on the grounds that inexperienced police officers will create a considerable amount of trouble for people, particularly in automobile offenses, which should be avoided. It is argued that experienced police officers have sufficient training and common sense to use their discretion in making such arrests while younger men tend to be over-zealous. The position taken by these opponents of the extension of the power of arrest is not wholly unreasonable but the unfortunate consequence is that we do not give the police the power they need for fear that in some cases it will be abused.

Possibly the answer is that the police officer should be given authority to issue a summons at the scene of a motor vehicle offense, rather than to make an arrest where no breach of the peace was committed. In cases of technical violations of municipal by-laws, a similar procedure could be followed.

We do not wish to be quoted as urging arrests of people for expectorating on the sidewalk, although the arrest of "litterbugs" might prove salutary as well as a boon to municipal economy.

In attempting to cope with the lawlessness of the era, the police have been saddled with constricting, but necessary, constitutional prohibitions.

It is thus particularly necessary at this time to grant them authority to uphold the law both in the particular situation and the law as a sustaining basis of society. The outmoded distinctions in the law of arrest for misdemeanors no longer make sense. The General Court has already realized this in the cases mentioned including gambling.

We feel that it would be better to grant complete authority to the officer rather than to enact, piecemeal, a long list of misdemeanor offenses for which an arrest can be made without a warrant. It is getting to the point where the officer must have a gun on one hip and a law book on the other, and this is undesirable.

Recognizing the argument of many concerned individuals that by reason of inexperience, over-zealousness, or even personal animosity, some officer might over-step the bounds, we recommend that thought be given to the idea of having the officer issue a summons for vehicle offenses as is now done in many instances.

The alleged offender could justify his position, if it was a good one, to a judge who would refuse to permit a prosecution on flimsy evidence, or in a case where the interests of society would not be served by the issuance of a complaint.

As to the specific bills referred to us, we recommend each of them\* but we go beyond the specific recommendation and renew our previous proposal as follows:—

## 1968 DRAFT ACT

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SECTION 28 OF CHAPTER 276 OF THE GENERAL LAWS IS HEREBY AMENDED BY STRIKING OUT SUCH SECTION AS IT NOW APPEARS AND SUBSTITUTING IN PLACE THEREOF THE FOLLOWING:—

- 1 Any officer authorized to serve criminal process may ar-
- 2 rest without the issuance of a warrant, and detain a person
- 3 found by him in the act of stealing property in his presence,
- 4 regardless of the value of the property stolen, *and may arrest*
- 5 *and detain a person who commits a misdemeanor in his pres-*
- 6 *ence*, and may also arrest and detain a person charged with a
- 7 misdemeanor, without having a warrant for such arrest in his
- 8 possession if the officer making the arrest and detention shall
- 9 have actual knowledge that a warrant, then in full force and ef-
- 10 fect for the arrest of such person has in fact issued.

\*The "detain" concept:—In view of recent decisions on matters of constitutional law, we would recommend that if the General Court sees fit to enact Senate (1967) No. 459, or Senate (1967) No. 460, the words "detain or" should be eliminated.

## AUTHORITY FOR ARRESTS WITHOUT A WARRANT — 1968

Partial List of Instances where a Police Officer May Arrest  
for Misdemeanor Without a Warrant.

CHAPTER	SECTION	OFFENSE
77	7, 13	Truant Officers may take children into custody for violation of probation or for truancy.
56	67	Police Officers may arrest for violations of election laws, Chapters 50-56.
90	21	Failure to have operators license at hand by a person who violates vehicle laws; also for improperly equipped vehicles in some instances.
91	58	Persons found in the act of committing a misdemeanor in or upon any of the rivers, harbors, bays or sounds within the commonwealth.
102	3	Illegal boarding of vessels, and certain offenses relating to seamen.
110 A	19	Illegal sale of securities.
111	171	Foulment of domestic water supply.
111	173	Person bathing in pond or stream etc. used for a public or domestic water supply.
120	12	Escapee from juvenile correctional institutions.
138	34 B, C	Liquor Identification Card Violations; Transportation by Minors.
148	35	Possession of bomb or explosive without authority.
159	93	Railroad Police may arrest persons committing certain offenses on railroad property if the offense is committed in the presence of the railroad or steamboat police.
159	104	Throwing missiles at a locomotive or interfering with the train.
160	220	Unauthorized riding on a freight train.

220	3	All persons concerned in a riot may be arrested without a warrant on command of a judge or justice.
264	12	Any person promoting anarchy.
266	16	Aliens picking berries, camping, or picknicking in Barnstable or Plymouth Counties without a permit.
266	120	Trespassing on enclosed land after being forbidden.
270	15	Expectorating on the street or public place, <i>if</i> the name of the offender is unknown to the officer.
271	2	Gaming in a public place or while trespassing on private property.
271	6	Gaming within one mile of or within 12 hours before a cattle show or certain public gatherings.
271	10 A	Gambling Offenses Secs. 7, 8, 9, 12, 16, 17, 17A, 18, and 22 of Ch. 271.
272	10	Morals Offenses, house of prostitution, lewdness.
272	44	Drunkenness in a public place.
272	50	Willful violation of town by-law, park regulation etc., or accosting others with profane or obscene language.
272	50	Detention of an unidentified person who throws filth, rubbish etc. in a public place until identity is learned.
272	82	Cruelty to Animals.
272	89	Fighting of birds, dogs or animals.
276	28	Larceny of Any Amount.

This is a partial list of situations in which misdemeanor arrests, for offences committed in the presence of an officer, can be made. A consideration of this list will demonstrate that when a particular problem became sufficiently serious the General Court was prevailed upon to grant the police officer additional authority.



The statutes listed were enacted at different times during the history of our commonwealth to cope with existing conditions. At present the general disrespect for law seems to require not a partial stop gap measure but a full scale grant of authority covering criminal conduct in all of its aspects.

In recent months some of the criminal statutes of our commonwealth have been held up to ridicule, and indeed Chapter 266 Section 16 does now seem absurd. However, a glance at the photographs in House Document No. 2300 of 1914, and a reading of the description of the labor camps into which immigrants were herded will present quite a different picture of the situation. It was only with such statutes, which are now archaic, that the social problem could be controlled.

We should also take the pains to point out that Chapter 367 of the Acts of 1967 and any existing statutes which make it a criminal offense to act in a suspicious manner, or to be a mere tramp, vagabond, or the like, and subject such persons to arrest, with or without a warrant, are unlikely to be upheld as constitutional. If the problem of suspicious persons and nomads is to be dealt with, the General Court will have to find some other way to do it. Those who merely "drop out" of our society are not by that decision alone subject to prosecution.

## "STOP AND FRISK"

# HOUSE . . . (1967) . . . No. 3013

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AN ACT FURTHER DEFINING THE POWERS OF POLICE OFFICERS AND THE COURTS  
RELATIVE TO PERSONS SUSPECTED OF CERTAIN CRIMES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1       SECTION 1. Section 98 of chapter 41 of the General Laws,
- 2       as most recently amended by section 1 of chapter 688 of the
- 3       acts of 1957, is hereby further amended by striking out the
- 4       third and fourth sentences and inserting in place thereof the
- 5       following sentences:—A police officer may stop any person
- 6       abroad whom he has reasonable ground to suspect is committing,
- 7       has committed or is about to commit a crime, and demand of
- 8       him his name, address, business abroad and whither he is

9 going. Any person so questioned who fails to identify himself  
10 or explain his actions to the satisfaction of the officer may be  
11 detained and further questioned and investigated. The total  
12 period of detention provided for by this section shall not exceed  
13 two hours. The detention shall not be considered an arrest  
14 and shall not be recorded as an arrest in any official record.  
15 At the end of the detention the person so detained shall be re-  
16 leased or be placed under arrest and charged with a crime.

1 SECTION 2. Said chapter 41 is hereby further amended by  
2 inserting after section 98 the following two sections:—

3 Section 98A. A police officer may search for a dangerous  
4 weapon any person whom he has stopped or detained as pro-  
5 vided in section ninety-eight, whenever he has reasonable  
6 ground to believe that he or others are in danger if the person  
7 possesses a dangerous weapon. If the officer finds a weapon, he  
8 may take and keep it until the completion of the questioning,  
9 when he shall either return it or place said person under ar-  
10 rest. The arrest may be for any violation of the General Laws  
11 pertaining to the unlawful carrying on his person or the un-  
12 lawful possession of certain firearms and other dangerous  
13 weapons.

14 Section 98B. Whenever a police officer has reasonable  
15 ground to believe that a crime has been committed, he may  
16 stop any person who he has reasonable ground to believe was  
17 present thereat and may demand of him his name and address.  
18 If the person fails to identify himself to the satisfaction of the  
19 officer, he may take the person before the next sitting of the  
20 court. If the person fails to identify himself to the satisfaction  
21 of the magistrate, the latter may require him to furnish secur-  
22 ity for his further appearance, may commit him to jail until  
23 he so identifies himself or may make other disposition is keep-  
24 ing with the purpose of this section and in the interest of  
25 justice.

The proposed statute involves what is known as the “Stop and Frisk” law. Our consideration of this legislation has been attended with no small amount of caution lest we fail to get timely notice of the very latest in constitutional law from our own Supreme Judicial Court, and the United States Supreme Court.

Section 1 of House (1967) 3013 deals with Chapter 41 Section 98 of the General Laws. In *Commonwealth v. Alegata*, (1967 Advance Sheets, p. \_\_\_\_\_) it was held that a person may not be arrested and prosecuted merely for acting *suspiciously*.

In *Commonwealth v. Lehan*, 347 Mass. 197, however, it was held (and confirmed in *Commonwealth v. Alegata*) that G.L. Chapter 41 Sec. 98:—

... "constitutionally permits a brief threshold inquiry where suspicious conduct gives the officer 'reason to suspect' the questioned person of 'unlawful design', that is, that the person has committed, is committing, or is about to commit a crime. What is reasonable within the principle of threshold inquiry must be decided in each case. An individual who acts in a suspicious way invites threshold investigation. It does not unreasonably invade the individual's right of privacy to hold that the price of indulgence in suspicious behaviour while abroad at night is a police inquiry."

So much then for the right of the police to "Stop",

... "the right of threshold inquiry does not include the right to search for evidence of crime in the absence of probable cause for arrest. Hence the officers might not constitutionally inspect the packages without Lehan's consent. We are of the opinion, however that an officer may act reasonably to assure that the inquiry can proceed in a manner consistent with the officer's safety."

In the 1964 *Lehan case*, the Supreme Judicial Court cited Section 3 of "The Uniform Arrest Act" which reads in Part:—

"A peace officer may search for a dangerous weapon any person whom he has stopped or detained to question . . . . whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon . . . ."

In the *Lehan case* the search was not a search for a weapon, and thus was not a lawful search.

In the recent decisions of the United States Supreme Court, one can find the principle that the States of the Union are not precluded from developing "workable rules" governing arrests, searches, and seizures to meet the "practical demands of effective criminal investigation and law enforcement" provided that those rules do not violate the constitutional proscriptions of unreasonable searches and seizures. (See *Ker v. California*, 374 U. S. 23)

### Constitutional Issues

In connection with the right to "frisk" there are constitutional protections which restrict the search to that which would be incident to a lawful arrest. If the "workable rules" include a rule allowing the police officer to protect himself, he should have the right to search for a weapon.

Section 1 of House (1967) No. 3013 runs into constitutional difficulty when it provides for a detention period for up to two hours.

Section 2 of the bill contains other constitutional problems.

On July 1, 1964 a "Stop and Frisk" law (Chapter 180a of the New York Code of Criminal Procedure) became effective in New York. The New York law is similar to Section 1 of the proposed legislation but does not include the two hour detention period. This New York law is the subject of a current consideration by the United States Supreme Court. Until the area is more clearly defined, we do not recommend any new legislation, and we do not recommend House (1967) No. 3013 in any event.

To more clearly define their rights and obligations, we do recommend that our police officers be given the benefit of an amended Section 98 of Chapter 41 of the General Laws as set forth in the following draft legislation.

## 1968 DRAFT ACT

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CHAPTER 41 OF THE GENERAL LAWS IS HEREBY FURTHER AMENDED BY STRIKING OUT SECTION 98 AND SUBSTITUTING THE FOLLOWING SECTION:—

1       SECTION 98. *Powers and duties.* The chief and other po-  
2       lice officers of all cities and towns shall have all the powers  
3       and duties of constables except serving and executing civil  
4       process. They shall suppress and prevent all disturbance and  
5       disorder. They may carry within the commonwealth such weap-  
6       ons as the chief of police or the board or officer having con-  
7       trol of the police in a city or town shall determine; provided,  
8       that any law enforcement officer of another state or territory  
9       of the United States may, while on official business within the  
10      commonwealth, may carry such weapons as are authorized by  
11      his appointing authority.

12      They may stop all persons abroad whom they have reason  
13      to suspect are committing, have committed, or are about to  
14      commit a crime, and may demand of them their name and  
15      address and an explanation of their actions; may disperse any  
16      unlawful assembly of three or more persons, and may enter  
17      building to suppress a riot or breach of peace therein.

18      Any person so stopped, and any person so assembled who  
19      does not disperse when ordered, and any person making, aiding  
20      or abetting in a riot or disturbance, may be arrested by the  
21      police if it appears that there is probable cause for the police  
22      to believe that a crime has been committed and that such is  
23      the person who committed it.



24 If a police officer stops a person for questioning pursuant  
25 to this section and reasonably suspects that he is in danger of  
26 life or limb, he may search such person for a dangerous weap-  
27 on. If he finds such weapon or any other thing the possession  
28 of which may constitute a crime, he may take and keep it un-  
29 til the completion of the questioning, at which time he shall  
30 return it, if lawfully possessed, or he shall arrest such person.

## TRIAL OF ACCESSORIES BEFORE THE FACT

# HOUSE . . . (1967) . . . No. 1858

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AN ACT PROVIDING THAT ACCESSORIES BEFORE THE FACT SHALL BE INDICTED,  
TRIED AND PUNISHED AS PRINCIPALS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 274 of the General Laws is hereby amended by  
2 striking out sections 2 and 3 and inserting in place thereof the  
3 following sections:—

4 *Section 2.* Whoever aids in the commission of a felony or is  
5 an accessory thereto before the fact by counselling, hiring or  
6 otherwise procuring such felony to be committed shall be  
7 indicted, tried and punished as a principal.

8 *Section 3.* Whoever counsels, hires or otherwise procures a  
9 felony to be committed may be indicted and convicted either  
10 with the person who directly committed the offense or after  
11 his conviction; and may be indicted and convicted whether  
12 the person who committed the offense has or has not been  
13 convicted or is or is not amenable to justice; and may be  
14 indicted, tried and punished in the same county where the  
15 person who directly committed the offense might be indicted  
16 and tried, although the counselling, hiring or procuring of the  
17 commission of such felony was committed within or without  
18 this Commonwealth or on the high seas.

Section 3 of General Laws, Chapter 274 now reads:—

*“Accessory before the Fact; When and How Tried.*—Whoever counsels, hires, or otherwise procures a felony to be committed may be indicted and convicted *as an accessory before the fact* either with the principal felon or after his conviction; or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice; and in the last mentioned case may be punished in the

same manner as if convicted of being an accessory before the fact. An accessory before the fact may be indicted, tried and punished in the same county where the principal felon might be indicted and tried, although the counselling, hiring or procuring the commission of such felony was committed within or without this commonwealth, or on the high seas."

The words in italics are to be stricken from Section 3 as it now exists and certain other changes are made so that the "principal" felon is now to be known as "the person who directly committed the offense".

Section 2 of Chapter 274 of the General Laws now reads:—

"ACCESSORY BEFORE THE FACT"—Whoever aids in the commission of a felony, or is an accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the same manner provided for the punishment of the principal felon."

This existing Section 2 is to be replaced by a new section 2 which would not only provide that an accessory before the fact be *punished* in the same manner as the principal, but also indicted, and tried as a principal.

By a careful reading of these statutes it can be observed that the true aim of the proposed legislation is to remove the distinction between principal and accessory so far as the indictment is concerned. At present a person involved in a crime may be indicted as a principal and may be able to avoid conviction by demonstrating that he was an accessory before the fact.

The distinction of "Accessory Before the Fact" has been in our law since 1784, but the provisions of Section 3 date from the famous Salem murder trial of John Francis Knapp in April of 1830. Daniel Webster summed up the situation in his closing argument to the jury in behalf of the Commonwealth:—

"Again it is said that it was not thought of making Francis Knapp, the prisoner at the bar, a PRINCIPAL, till after the death of Richard Crowninshield, Jr.; that the present indictment is an afterthought: that 'testimony was got up' for the occasion. It is not so. There is no authority for this suggestion. The case of the Knapps had not then been before the Grand Jury. The officers of the government did not know what the testimony would be against them. They could not, therefore have determined what course they should pursue. They intended to arraign all as principals who should appear to have been principals, and all as accessories who should appear to have been accessories. All this could be known only when the evidence should be produced. " . . . "Gentlemen, let us now come to the case. Your first inquiry on the evidence, will be, was Captain White murdered in pursuance

of a conspiracy, and was the defendant one of this conspiracy? If so, the second inquiry is, was he so connected with the murder itself as that he is liable to be convicted as a *principal*? The defendant is indicted as a *principal*. If not guilty as such, you cannot convict him. The indictment contains three distinct classes of counts. In the first, he is charged as having done the deed with his own hand; in the second, as an aider and abettor to Richard Crowninshield, Jr., who did the deed; in the third as an aider and abettor to some person unknown. If you believe him guilty in either of these counts, or in either of these ways, you must convict him."

Webster explained to the jury that Richard Crowninshield, Jr., the actual murderer, had committed suicide. Another member of the murder band, Joseph Knapp had not yet been tried. The prosecution had made a deal with him which he later abrogated. Webster presented the situation which led to the present Section 3 of Chapter 274 in these words:—

"Your decision may affect more than the life of this defendant. If he be not convicted as a principal, no one can be, nor can any one be convicted of a participation in the crime as an accessory. The Knapps and George Crowninshield will be again on the community. This shows the importance of the duty you have to perform, and serves to remind you of the case and wisdom necessary to be exercised in its performance.

As Francis Knapp was proved a conspirator in the murder effort, he was convicted and executed. Had such proof failed he would have gone free under the law applicable in 1830.

The time has come to eliminate the present artificial distinction involved here so far as the indictment is concerned.

We recommend this bill.

## DISCOVERY IN CRIMINAL CASES

# SENATE . . . (1967) . . . No. 85

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AN ACT RELATIVE TO DISCLOSURE IN CRIMINAL CASES ON MOTION OF THE PARTIES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 277 of the General Laws, as appearing in the
- 2 Tercentenary Edition, is hereby amended by inserting after
- 3 section 40 of the following sections:—

4       *Section 40A.* When presented with a motion of defendant  
5 which is as specific as is reasonable under the circumstances  
6 the court shall order the attorney for the commonwealth to  
7 permit the defendant to inspect and copy or photograph any  
8 relevant (a) exculpatory information or material; (b) writ-  
9 ten or recorded statements or confessions made by the de-  
10 fendant; (c) results or reports of scientific tests or experi-  
11 ments, and any physical or mental examinations; (d) recorded  
12 testimony of the defendant before a grand jury; and (e) rec-  
13 ords of prior convictions of the defendant; or copies thereof,  
14 within the possession, custody or control of the common-  
15 wealth, the existence of which is known to the attorney for  
16 the commonwealth or to the defendant.

17       *Section 40B.* When presented with a motion of the de-  
18 fendant which is as specific as is reasonable under the circum-  
19 stances, showing that reasonable efforts to obtain such infor-  
20 mation or material have been made, the court shall order the  
21 attorney for the commonwealth to permit the defendant to  
22 inspect and copy or photograph any relevant books, papers,  
23 documents, tangible objects, buildings or places, or copies or  
24 portions thereof, within the possession, custody or control of  
25 the commonwealth, the existence of which is known to the  
26 attorney for the commonwealth or to the defendant.

27       *Section 40C.* When presented with a motion of the defend-  
28 ant which is as specific as is reasonable under the circum-  
29 stances, showing that reasonable efforts to obtain such infor-  
30 mation or material have been made, the court shall order the  
31 attorney for the commonwealth to do any one or more of  
32 the following:

33       First, to disclose to the defendant the names and addresses  
34 of any persons whom the attorney for the commonwealth  
35 knows to have relevant evidence or information, and to indi-  
36 cate those persons whom he intends to use as witnesses;

37       Second, to permit the defendant to inspect and copy or photo-  
38 graph any relevant written or recorded statements including  
39 testimony before a grand jury made by such persons or by co-  
40 defendants and any relevant records or prior convictions of  
41 such persons or co-defendants or copies thereof, within the  
42 possession, custody or control of the commonwealth, the exist-  
43 ence of which is known to the attorney for the commonwealth  
44 or to the defendant;

45       Third, to cooperate in the conducting of informal interviews  
46 by the defendant of such persons, not co-defendants under the  
47 supervision of the court.

48       *Section 40D.* When the court orders discovery or inspection  
49 to the defendant under clause (c) of section forty A or under  
50 section forty B, the court may upon motion of the common-



wealth order that the defendant permit the commonwealth to inspect and copy or photograph any items within said clause or said section which are known by the defendant to be in the possession, custody or control of the defendant and which the defendant intends to introduce into evidence at the trial. When the court orders discovery or inspection to the defendant under clause First of section forty C, the court may upon motion of the commonwealth order that the defendant disclose the names and addresses of those persons, known to the defendant, whom the defendant intends to use as witnesses at the trial. This subsection does not authorize the discovery or inspection of reports, memoranda or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation of the case or the preparation of the defense, or of statements made by the defendant or by commonwealth or defense witnesses to the defendant, his agents or attorneys.

The court may upon motion of the commonwealth order the defendant to serve written notice upon the attorney for the commonwealth at least forty-eight hours before trial of any defense based upon alibi or insanity which defendant intends to rely upon at trial. In cases of claimed alibi such notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense together with the names and addresses of witnesses to his alibi, if known to the defendant.

*Section 40E.* An order of the court granting relief shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

*Section 40F.* Upon a motion and sufficient showing by the commonwealth the court may at any time order that the discovery or inspection under sections forty B and forty C be denied, restricted or deferred, or make such other order as is appropriate. In considering the commonwealth's motion, the court may consider the following:—

First, protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and all forms of intimidation;

Second, maintenance of such secrecy regarding informants as is required for effective investigation by an agency of the commonwealth of criminal activity;

Third, protection of such confidential relationships as are recognized by applicable law; and

Fourth, any other relevant considerations. Upon motion the court may permit the commonwealth to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the commonwealth's statements may be sealed and shall be preserved in the records of the court to be made available

101 to the appellate court in the event of an appeal.

102 *Section 40G.* A motion under sections forty A to forty D in-  
103 clusive may be made only in a criminal case and within ten  
104 days after arraignment or at such reasonable later time as the  
105 court may permit. The motion shall include all relief sought  
106 under this section. A subsequent motion may be made only  
107 upon a showing of cause why such motion would be in the  
108 interest of justice.

109 *Section 40H.* If, subsequent to compliance with an order  
110 issued pursuant to this statute and prior to or during trial, a  
111 party discovers additional material previously requested or  
112 ordered which is or may be subject to discovery or inspection  
113 under this section, he shall promptly notify the other party  
114 of his attorney or the court of the existence of the additional  
115 material for proper disposition by the court. If at any time  
116 during the course of the proceedings it is brought to the at-  
117 tention of the court that the attorney for the commonwealth  
118 has failed to use due diligence to learn whether information or  
119 material within a discovery order is in the possession, custody  
120 or control of the commonwealth or that either party has failed  
121 to comply with this section, the court may order such party to  
122 permit the discovery or inspection of such information or ma-  
123 terial not previously disclosed, grant a continuance, prohibit  
124 the party from introducing in evidence the material not dis-  
125 closed, enter such other order as it seems just under the cir-  
126 cumstances, or enter any combination of the foregoing.

This legislation is indicative of a significant departure from the concept that a criminal case is an adversary proceeding from beginning to end. Its basic philosophy is to permit the *defendant* (possibly at some risk) to require the prosecutor for the Commonwealth to reveal, in advance of trial, the evidence which may be vital in any effort to secure a conviction.

In the case of *Bowman Dairy Co. et al v. United States et al* 341 U.S. 214 it was decided by the United States Supreme Court in 1951 that under the Federal Rules of Criminal Procedure (since enlarged and broadened) a more liberal discovery policy should apply in criminal cases. In the *Bowman Dairy Co.*, case, counsel for the defendants in an anti-trust proceeding served a subpoena on the government, under Rules 16 and 17 of the Federal Rules of Criminal Procedure,

“for all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to government counsel which consist of narrative statement of persons or memoranda of interviews), obtained by Government counsel in

any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants . . . ."

The U.S. District Court ordered the Government to produce everything called for under the subpoena of defense counsel. The Government then moved to quash the subpoena, and failing that, the government attorney in possession of the subpoenaed materials refused to produce them and was held in contempt for so doing. The attorney for the government was willing to produce everything not obtained by seizure or process, (other than the work product of government attorneys) but would not produce "documents furnished to the government by voluntary and confidential informants."

The objection of the government was that the subpoena would not protect confidential informants who have provided the government with confidential information which the Government felt was protected from the view of the defense by long established principles. The U. S. Supreme Court said:—

" . . . . There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena. It was material of this character which the Government was unwilling to stipulate to produce or produce in obedience to the subpoena. Such materials were subject to the subpoena. Where the court concludes that such materials ought to be produced, it should, of course, be solicitous to protect against disclosures of the identity of informants, and the method, manner and circumstances of the Government's acquisition of the materials."

In the *Bowman Dairy Co.* case, the U.S. Supreme Court did not permit any fishing expedition:—

"The subpoena calls for materials which the Government is bound to produce and for materials it is not bound to produce. The District Court said: 'Give us all'. The Government replied: 'We will give you nothing'. Both were wrong."

Since 1951, Rule 16 of the Federal Rules of Criminal Procedure has been widely used and the principles of Criminal Discovery have been developed in the Federal Courts. In 1966, Rule 16, (which was involved in the *Bowman Dairy Co. case*) was rewarded and greatly expanded on the basis for fifteen years of experience. The new Federal Rule 16 reads as follows:—

## **Federal Rules of Criminal Procedure**

### **Rule 16**

#### **Discovery and Inspection**

“(a) Defendant’s Statements; Reports of Examinations and Tests; Defendant’s Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect any copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government’s case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does



not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. As amended Feb. 28, 1966, eff. July 1, 1966.

### **Footnote 1966 Amendment**

Reworded and greatly expanded this rule. Prior thereto the rule read:

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect any copy or photograph designated books,

papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

Senate (1967) No. 85 is based on the philosophy of Rule 16 of the Federal Rules of Criminal Procedure but does not extend the procedure to the limits of the revised Federal Rule which became effective on July 1, 1966.

The Judicial Council has considered the proposal of Senate No. 85 of 1967 as affected by the new Federal Rule 16, and other current proposals.

Criminal Discovery is the subject of an intensive study of the Special Sub-Committee of the Committee on Criminal Law of the Massachusetts Bar Association. This sub-committee is composed of persons who represent the views of the prosecutor, the police, and the defense counsel. The Judicial Council is anxious to review the report of this sub-committee before making any definite recommendation in the field of criminal discovery. It would appear that some legislation in this area might be worthy of consideration and a special report will be filed by the Judicial Council on this subject sometime in 1968.

## "EXAMINATION BY EXPERTS"

# SENATE . . . (1967) . . . No. 436

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AN ACT TO PROVIDE FOR THE EXAMINATION BY EXPERTS OF RECORDS SUBPOENAED  
BY A GRAND JURY.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter two hundred and seventy-seven of the General Laws
- 2 is hereby amended by adding thereto a new section number
- 3 fourteen A as follows:—
- 4 *Section 14A.* Whenever any documents, records, and other
- 5 physical evidence are furnished to a Grand Jury pursuant to a
- 6 subpoena issued on behalf of the Grand Jury, the Grand Jury

7 may retain such documents, records, and other physical evi-  
8 dence for the purpose of having such documents, records, and  
9 other physical evidence examined at a convenient place to be  
10 designated by the Grand Jury, by accountants, laboratory  
11 technicians, or other experts, or by the District Attorney, or  
12 Attorney General, or his Assistants for the purpose of  
13 analyzing such documents, records, and other physical evi-  
14 dence and reporting thereon to the Grand Jury. Any expert  
15 designated by the Grand Jury to inspect such documents, rec-  
16 ords, and other physical evidence as aforesaid other than a  
17 District Attorney, the Attorney General, or their Assistants  
18 shall first be brought before the Grand Jury and sworn to the  
19 faithful performance of his duty, and further sworn to main-  
20 tain said documents, records, and othe physical evidence in  
21 the same condition as they were when submitted to him, and  
22 further sworn to maintain secrecy concerning his activities on  
23 behalf of the Grand Jury until such time as he may be called to  
24 testify concerning them before a Court of the Commonwealth.

25 Upon the termination of the Grand Jury's investigation con-  
26 cerning said documents, records, and other physical evidence,  
27 they shall be returned to the person who furnished them to  
28 the Grand Jury, unless the Grand Jury shall have returned an  
29 indictment based upon said documents, records, and other  
30 physical evidence. In such case, upon motion of the District  
31 Attorney or Attorney General, the Court may order said  
32 documents, records, and other physical evidence impounded  
33 pending the trial of said indictment. The Court may permit  
34 such inspection of said impounded documents, records, and  
35 other physical evidence pending the trial of said indictment by  
36 the defendant, or his attorney, or by the District Attorney, or  
37 the Attorney General, or their Assistants as justice may re-  
38 quire; and a defendant shall have the right to inspect his own  
39 records which have been so impounded, upon motion, subject  
40 to such safeguards as the court may deem necessary to safe-  
41 guard said records.

The bill printed above (Senate (1967) No. 436) appears to be identical with Senate (1967) 466 which was referred to us for study also. Both of these bills appear to be identical with Senate (1965) No. 287 which was referred to us for study by Chapter 17 of the Resolves of 1965. In our 41st Report for 1965 at pages 27 - 35, we discussed this legislative proposal in some detail and pointed out that the bill was deficient in several respects.

The title of the bill is somewhat misleading. One would assume that by this bill the grand jury might obtain the services of experts (such as certified public accountants) to examine records and make reports and summaries. The bill provides for exam-

ination of "*any documents, records and other physical evidence.*"

Under this proposal the District Attorney and his assistants, or the Attorney General and his Assistants could summons documents, records, and "other physical evidence" before the Grand Jury, explain to the Grand Jurors that it would take time to analyze or examine such material or evidence, and then impound or withhold the material for an indefinite period. The prosecutor would thus have almost unrestricted power over documents, records, or anything else that he might wish to examine. It is to be noted that there would need not be any indictment returned in order for the prosecutor to have a right to demand the production of such things. We said in our 41st Report, at page 31, that this bill really gives subpoena power to the Attorney General or the District Attorney over just about any sort of physical evidence one could imagine, and even more, such evidence would, as a practical matter, be impounded for long periods of time.

This proposed legislation is an outgrowth of the activities of the "Massachusetts Crime Commission" (1965) and in our 41st Report we also indicated that such a proposal was a circuitious method of giving the subpoena power to the Attorney General or the District Attorney. Whether this idea is desirable or not would seem to lie with the General Court, and the people of the Commonwealth. We do not feel that such a procedure should be allowed to come about indirectly.

The "Crime Commission" indicated that the use of subpoenas for the production of documents, records, and other things should be subject to the general supervision of the Superior Court at all times.

These bills, and earlier ones, make no provision for supervision by the court. We reiterate our previous position of opposition to such legislation and again cite the major defects:—

### **Major Defects of the Legislation**

1. The proposal is far reaching. It is NOT a mere convenience so that the Grand Jury could have experts at hand to testify as to matters requiring special skills and learning such as fingerprinting, accounting, ballistics, pathology etc. Any record, document, or anything else could be involved; and the "experts" would very definitely include the prosecutor and his staff.
2. Control over the physical evidence should be vested in the Court, not in the prosecutor. The Court should determine what safeguards might be needed, and how best to prevent harassment.



3. Presumably the "expert" would render a report or an opinion, and presumably the report or opinion would be intended to move the Grand Jury to indict. The "expert" and his conclusions are immediately shrouded with secrecy "until such time as he may be called to testify concerning" the material before a Court of the Commonwealth. Whether the veil of secrecy might be pierced we can only speculate. If the examination took a long time, when would the defense have an opportunity for its own examination and study? The expert would (if other than a prosecutor) be a witness in the trial and the trend in criminal discovery is for less and less secrecy. If the expert was a prosecutor, a difficult problem would be presented.

4. The impounding of all the evidence on the motion of the prosecutor after an indictment, and until the trial takes place, would seriously interfere with the preparation of the defense. Possibly the defense would be asked to designate what records or other things it desired to see. This would be very useful information for the prosecution to have at hand.

5. There is no provision for furnishing copies of documentary evidence, or other evidence which could be copied readily. If it is contended that the original documents should be impounded, the Commonwealth should furnish free copies of everything to the defense. In many instances the originals would need to be consulted.

6. Impounding of records and books could seriously impair the regular and usual operation of a business; and it might well be that the books and records of an innocent by-stander were summoned.

7. There is no provision allowing the owner to examine the records while they were in the possession of the prosecutor and the Grand Jury. Masses of material could be spirited away with a subpoena and held for months at a time while the examination took place. A person accused of tax evasion could be served with a subpoena which in effect would allow the Attorney General's office to examine all of his books and records to see whether or not the suspicion was well founded.

For the above reasons and for the reasons we gave in our 41st Report for 1965, we do not recommend this legislation.

## POST CONVICTION PROCEDURE

# SENATE . . . (1967) . . . No. 480

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AN ACT FOR PROVIDING RELIEF IN CRIMINAL CASES FROM CONVICTIONS OBTAINED  
AND SENTENCES IMPOSED WITHOUT DUE PROCESS OF LAW.

*Be it enacted by the Senate and House of Representatives in General Court  
assembled, and by the authority of the same, as follows:*

1 Sections nine through thirteen of chapter two hundred and  
2 fifty of the General Laws are hereby repealed, and the follow-  
3 ing chapter two hundred and fifty A is hereby enacted:

4 POST-CONVICTION PROCEDURE ACT

5 *Section 1. Post-Conviction Procedure Established; Purpose;*  
6 *Other Procedures Suspended.* This act establishes a post-  
7 conviction procedure for relief from convictions obtained and  
8 sentences imposed without due process of law. The procedure  
9 hereby established supersedes all common law and statutory  
10 procedures for the same purpose that exist when this act  
11 becomes effective including habeas corpus and writ of error.  
12 However, nothing in this act limits the availability of remedies  
13 in the trial court or on direct appeal.

14 *Section 2. Eligibility for relief.* To be eligible for relief  
15 under this act, a person must initially file a petition under the  
16 provisions of Section four hereof and must prove that:

- 17 (a) Petitioner has been convicted of a crime;  
18 (b) Petitioner is either incarcerated under a sentence of  
19 death or imprisonment or on parole or probation;  
20 (c) The conviction or sentence of the petitioner violates the  
21 constitution or laws of the United States or the consti-  
22 tution or laws of this Commonwealth and;  
23 (d) The error resulting in the conviction and sentence of  
24 the petitioner has not been finally litigated or waived.

25 *Section 3. When an Issue is Finally Litigated or Waived.*

- 26 (a) For the purposes of this Act an issue is finally litigated  
27 if  
28 (1) it has been raised in the trial court, and the trial  
29 court has ruled on the merits of the issue, and the  
30 petitioner has knowingly and understandingly failed  
31 to appeal the ruling of the trial court; or  
32 (2) the Supreme Judicial Court has ruled on the merits  
33 of the issue  
34 (b) For the purposes of the act an issue is waived if  
35 (1) the petitioner with knowledge and understanding  
36 failed to raise an issue which could have been raised  
37 either before the trial, at the trial, on appeal, in a  
38 habeas corpus proceeding or any other proceeding  
39 actually conducted, or in a prior proceeding actually  
40 initiated under this act; and  
41 (2) the petitioner is unable to prove the existence of  
42 extraordinary circumstances to justify his failure  
43 to raise the issue.  
44 (c) There is a rebuttable presumption that a failure to  
45 appeal a ruling or to raise an issue is an omission done  
46 knowingly and with understanding.

47

## INITIATION OF PROCEEDINGS

48       *Section 4. Petition.* Any person who desires to obtain relief  
49 under this act may initiate a post-conviction proceeding by  
50 filing a petition at any time with the clerk of the court in  
51 which he was convicted. A petition must be in the following  
52 form:

53       (a) The petition must state that it is a Post-Conviction Pro-  
54 cedure Act Petition. It must include the name of the petitioner,  
55 his place of confinement, if any, an identification of the pro-  
56 ceedings in which the petitioner was convicted, the place of  
57 conviction, the date of the entry of judgment, the sentence  
58 imposed, the alleged error on which the petition is based, the  
59 relief desired, and an identification of all previous proceedings  
60 that the petitioner has taken to secure relief from his convic-  
61 tion or sentence.

62       (b) The petition must include either affidavits, records, and  
63 other supporting evidence or state why they are not included.

64       (c) The petitioner may, but need not include argument or  
65 citations and discussion of authorities.

66       (d) All facts within the personal knowledge of the petitioner  
67 must be set forth separately from other allegations of fact.

68       *Section 5. Docketing.* Upon receipt of a petition seeking  
69 relief under this act, the clerk of the court in which the petition  
70 is filed shall immediately docket the petition and promptly  
71 notify the court and the Attorney General of the Common-  
72 wealth.

73       *Section 6. Amendment and Withdrawal of Petition.* The  
74 court may grant leave to amend or withdraw the petition at  
75 any time. Amendment shall be freely allowed in order to  
76 achieve substantial justice. No petition may be dismissed for  
77 want of specificity unless the petitioner is first given an oppor-  
78 tunity to clarify his petition.

79       *Section 7. Answer.* The Attorney General of the Common-  
80 wealth shall respond by answer or motion within thirty (30)  
81 days after the petition is docketed or within such time as the  
82 court orders. If the petition does not include records of the  
83 proceedings required to be attached thereto by section four  
84 hereof, the respondent shall file with his answer the records  
85 or parts of records that are material to the questions raised  
86 in the petition.

87

## HEARINGS

88       *Section 8. When Hearing Granted.* If a petition alleges  
89 facts that if proven would entitle the petitioner to relief, the  
90 court shall grant a hearing. However, the court may deny a  
91 hearing if the claim of the petitioner is frivolous on its face  
92 and without support either in the record or from other evi-  
93 dence submitted by the petitioner. The court may also deny a

94 hearing on a specific question of fact when a full and fair  
95 evidentiary hearing upon that question was held at the original  
96 trial or at any later proceeding.

97 *Section 9. Scope of Hearing.* The hearing may extend only  
98 to the issues raised in the petition or answer.

99 *Section 10. Requirement of Full and Fair Hearing.* The  
100 petitioner shall have a full and fair hearing on his petition.  
101 The court shall receive all evidence that is relevant and neces-  
102 sary to support the claims in the petition including affidavits,  
103 depositions, oral testimony, certificate of the trial judge, and  
104 relevant and necessary portions of the transcripts of prior  
105 proceedings.

106 *Section 11. Evidence Recorded.* Evidence at the hearing  
107 shall be recorded.

108 *Section 12. Right to Personal Appearance.* The petitioner  
109 has the right to appear in person at the hearing.

110 *Section 13. Order of the Court.* If the court finds in favor  
111 of the petitioner, it shall order appropriate relief and issue any  
112 supplementary orders as to rearraignment, retrial, custody,  
113 bail, discharge, correction of sentence, or other matters that  
114 are necessary and proper.

115 *Section 14. Final Disposition of the Petition.* The order  
116 finally disposing of the petition shall state the grounds on  
117 which the case was determined and whether a Federal or a  
118 Commonwealth right was presented and decided. Such order  
119 shall constitute a final judgment for purposes of review.

120 *Section 15. To Whom Copy of Order Sent.* A copy of the  
121 order shall be sent to the petitioner, counsel of record for the  
122 petitioner, and the Attorney General of the Commonwealth.  
123 The original order shall be filed with the court records and  
124 papers in the case.

## 125 RIGHT OF APPEAL

126 *Section 16. Who May Appeal.* The party aggrieved by an  
127 order under section thirteen or section fourteen hereof may  
128 apply to the Supreme Judicial Court for leave to appeal from  
129 the order within thirty days from the day on which the order  
130 is issued.

131 *Section 17. Contents of Application for Leave to Appeal.*  
132 An application for leave to appeal must be accompanied by a  
133 record which contains the petition, answer or motion of the  
134 Attorney General and the order and statement of the court.  
135 In addition the Supreme Judicial Court may order a transcript  
136 of the post-conviction hearing certified to it as part of the  
137 record in its discretion or on motion by either party.

## 138 INDIGENTS

139 *Section 18. Right to Record.* If the court finds that the  
140 petitioner is unable to pay for a copy of the record of any trial



141 court proceeding or appellate court proceeding that he seeks  
142 to attack under this act, the court shall furnish her or him  
143 with a certified copy of the record without charge.

144 *Section 19. Right to Transcript.* If a hearing is granted  
145 under section eight hereof and the court finds that the peti-  
146 tioner is unable to pay for a copy of the transcript of a pro-  
147 ceeding that he seeks to attack under this act, the court shall  
148 furnish her or him without charge a copy of such portions of  
149 the transcript as the petitioner certifies and the court finds to  
150 be relevant and necessary to support any allegation in the  
151 petition.

152 *Section 20. Right to Counsel.* If a hearing is granted under  
153 section eight hereof and the court finds that the petitioner is  
154 unable to employ counsel, the court shall appoint counsel for  
155 her or him.

156 *Section 21. Right to Counsel on Appeal; Costs of Appeal.*  
157 If an appeal is sought by the petitioner under section sixteen  
158 hereof and the Supreme Judicial Court finds that the appeal is  
159 not frivolous and that the petitioner is unable to pay the costs  
160 of the appeal or to employ counsel, the Supreme Judicial Court  
161 shall appoint counsel for the petitioner, and shall provide for  
162 payment of the costs of the appeal shall order the respondent  
163 to furnish the documents required to accompany the applica-  
164 tion for leave to appeal.

## POST-CONVICTION PROCEDURE ACT

We oppose this bill.

An analysis of the "Post Conviction Procedure Act" may be found in our 42nd Report for 1966 at pages 48 to 55. As this report is so recent, we do not believe that a full repetition of our remarks would be useful here. We do feel that it might be of assistance to the General Court if we repeated our conclusions, given in 1966, once again.

Because our existing procedures are rooted in the past some argue that a codified set of rules would provide a better method of review. We have examined the proposed post-conviction code set forth in S. 256,<sup>1</sup> and we reach the conclusion that it introduces constrictions which do not seem to further assure the constitutional rights of the citizen. We believe that existing procedures guarantee to all the protection of their liberties and rights under the Federal and State Constitutions. If zealous and resourceful defense counsel

<sup>1</sup> NOTE: The bill referred to the Judicial Council in 1967 was Senate (1967) No. 480. This bill appears to be identical with Senate (1966) No. 256. In our 41st Report for 1965 we discussed a "Uniform Post Conviction Procedure Act" which was recommended by the Commission on Uniform State Laws, House (1965) No. 143. In 1965, we failed to find a need for this type of legislation in Massachusetts.

seek to explore every avenue in order to secure the release of their clients or if a prisoner can discover some approach, some writ, or some novel method by which to achieve his release, we register no objection. The exploration of such avenues, the discovery of such approaches and writs, and the employment of novel methods either in the courts of this commonwealth or in the Federal courts do not constitute proof that there is a denial of constitutional rights but rather they prove the wisdom of the saying 'Where there is life, there is hope'.

We do not recommend any Post-Conviction Procedure Act at this time."

## WRIT OF ERROR 1967

To demonstrate what is now accomplished by the post conviction procedure known as a writ of error, we have analyzed four recent criminal convictions which were reviewed by the Supreme Judicial Court. In three cases the conviction was set aside. The case cited may be of great interest.<sup>2</sup> In the "Tenth Annual Report to the Justices of the Supreme Judicial Court" by the Executive Secretary, (Richard D. Gerould, Esquire) June 30, 1966, at page 9, reference is made to the "Uniform Post Conviction Procedure Act" and legislative proposals of a similar nature. Secretary Gerould comments:—

"Unlike several of the states, Massachusetts has not been faced with an impossible burden of petitions for writs of error in the Supreme Judicial Court or of petitions by persons convicted in state courts for writs of habeas corpus in the United States Courts.

In this rapidly developing and changing area of criminal law, it seems best to preserve our flexibility by the use of existing procedural devices which have demonstrated their ability to safeguard the rights of post conviction petitioners. The Uniform Post Conviction Procedure Act itself has been the subject of change and has not met with universal success."

We believe that the flexibility available to our Supreme Judicial Court in dealing with claims of persons convicted of crimes — claims that their conviction was obtained by improper or unconstitutional methods — is best typified by the decision handed down by that court in November of 1967 which set aside the convictions of four persons on constitutional grounds. The route taken by those convicted to test their rights was a Writ of Error. In summary form the nature of the case can be understood by reference to the following table:—

<sup>2</sup> Commonwealth v. Alegata, Mass. Nov. 1967.

DEFENDANT	OFFENSE CHARGED	DISPOSITION BY COURT	BASIS OF APPEAL TO S.J.C.
Mitchell (Suspicious Person)	Being abroad in the Night-time— Failure to give a satisfactory account. Suspected of unlawful design. Chapter 41, Section 98.	Convicted and sentenced to pay a fine.	Statute is unconstitutional. (A) does not state a crime for which punishment may be imposed. (B) the words which describe the offense are vague and indefinite.
Patch (Vagrant)	Being "an idle person who not having any visible means of support has lived without lawful employment." i.e. a Vagrant. Chapter 272, Section 66.	Sentence of three months in the House of Correction.	Statute is unconstitutional. (A) does not state a crime for which punishment may be imposed. (B) Words describing the offense are vague and indefinite.
Riley Fido (Tramp)	A rover about living without labor or visible means of support—a tramp. Chapter 272, Section 63 (This statute also prohibits begging.)	Convicted — Ten days in the House of Correction. (It was not clear whether Fido was actually begging.)	Statute is unconstitutional. (A) going about or roving without visible means of support is not a crime. (B) The words of the law are vague and indefinite.
Alegata (Known thief acting suspiciously in a store.)	A person known to be a thief or pickpocket acting suspiciously in a store or public place to be deemed a vagabond. Chapter 272, Section 68.	Convicted — Nine months in House of Correction.	Statute is unconstitutional. (A) Standard of conduct is not constitutionally prohibited. (B) Vague and Indefinite.
Chatrand (Idle and disorderly)	Charged as an "idle and disorderly person" in a public place. Chapter 272, Section 53.	Convicted — \$50.00 Fine Thirty days in jail.	Statute is unconstitutional because the words are too vague as to what "disorderly" actually covers.

## SUMMONS TO PARENTS OF MINORS

**SENATE . . . (1967) . . . No. 471**

AN ACT TO SUMMONS PARENT OR GUARDIAN OF A MINOR TO ATTEND COURT PROCEEDINGS AGAINST MINOR.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Whenever a criminal complaint has been made against a
- 2 minor, excepting in cases of violation of parking laws, a sum-
- 3 mons to appear at the hearing of such criminal complaint
- 4 shall be given to the minor's parent or guardian. Said sum-
- 5 mons shall contain the day and date of the hearing, the day
- 6 and date of the offense and the nature of the offense. If said
- 7 parent or guardian shall fail to appear at the hearing of the
- 8 complaint against the minor, or on such days and dates on
- 9 which the hearing has been continued unless excused by the
- 10 Court, the Court may issue a warrant against said parent or
- 11 guardian for failure to appear. Penalty for violation under
- 12 this act shall be a fine of no less than ten dollars and no more
- 13 than fifty dollars.

We recommend this bill with the amendment suggested below.

As the law now stands, it is within the power of the juvenile court to require the attendance of the parent or guardian of a juvenile offender. Chapter 119 Section 55 provides:—

“§55. Summoning of parent or guardian; service; agent of division of youth service; notice. If a child has been summoned to appear or is brought before such court upon a warrant, as provided in section fifty-four, a summons shall be issued to at least one of its parents, if either of them is known to reside within the commonwealth, and, if there is no such parent, then to its lawful guardian, if there is one known to be so resident, and if not, then to the person with whom such child resides, if known. Said summons shall require the person served to appear at a time and place stated therein, and show cause why such child should not be adjudged a wayward or delinquent child, as the case may be. If there is no such parent, guardian or person who can be summoned as aforesaid, the court may appoint a suitable person to act for such child.

If such child is summoned, the time for appearance fixed in the summons to a parent, guardian or other person, as herein provided, shall, when practicable, be that fixed for the appearance of said child.

A summons required by this and said section fifty-four, unless service thereof is waived in writing, shall be served by a constable or police officer,



by delivering it personally to the person to whom addressed, or by leaving it with a person of proper age to receive the same, at the place of residence or business of such person; and said constable or officer shall immediately make return to the court of the time and manner of the service.

If the court shall be of opinion that the interests of the child require the attendance at any proceedings of an agent of the division of youth service, and shall request such attendance by reasonable notice to the director of said division, such agent shall attend to protect the interests of said child. As amended St. 1949, c. 593, § 6; St. 1952, c. 605, § 3."

A minor is a person under the age of 21. There is no existing authority to subpoena the parent of an offender between 17 and 21 charged with a crime, or a juvenile who is charged with a criminal offence other than in a juvenile session.

While we do not think it is necessary to provide that a summons be given in every criminal case, so that the parent or guardian will appear with the minor, we do think it would be useful to empower the courts to cause the parent or guardian to appear in those cases where it would be in the interests of justice. One example of this is in connection with a disposition after conviction. It might be of assistance to the court to discover the attitude of the parents at the time of a disposition. For whatever good influence a parent might be able to exercise, a court appearance might be in order. And for the parent who may be too busy to become involved in the court appearance of one of his children, a summons to that parent might have the effect of at least a dim reminder of parental responsibility. We would recommend this bill provided that in the fourth line the word "shall" be changed to the word "may".

CRIMINAL RECORDS

HOUSE . . . (1967) . . . No. 1657

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AN ACT PROVIDING THAT THE RECORD OF CONVICTION FOR CERTAIN MISDEMEANORS SHALL BE DESTROYED SEVEN YEARS FROM THE DATE OF THE CONVICTION FOR THE LAST SUCH OFFENSE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       Section 100 of chapter 276 of the General Laws, as most  
2       recently amended by section 22 of chapter 731 of the acts of  
3       1956, is hereby further amended by adding the following sen-  
4       tence:—A record of conviction for any misdemeanor, except  
5       those involving the sale, use or possession of narcotics or of  
6       a sex offense, shall be destroyed after seven years from the  
7       date of the conviction for the last such offense, and no copy  
8       of such record shall thereafter be used in any proceeding or  
9       matter involving the defendant named therein.

We do not recommend this bill.

We are not unmindful of the object of this legislative proposal. Those who favor this type of legislation are of the opinion that it is socially useful to wipe the slate clean. The most basic texts on criminology reveal that the incidence of criminal behaviour is more likely to be between the age of fifteen and twenty five. We should well consider therefore whether or not it serves the purposes of society to wipe the slate clean for everyone at the age of 30, for example.

We might also consider whether it is enough merely to consider the most recent seven years of a long criminal record when making a disposition of a case.

We do not believe in the use of criminal records for the purpose of embarrassment, or harassment. Such records do not generally become public, except in the most notorious cases. Once in a while, during the heat of a political campaign, an old record of a misdemeanor conviction will be dug up but this does not usually carry much weight with the voters.

The most common situation in which these records are used are (1) for the purpose of impeaching the credibility of a witness in a civil or criminal trial, (2) in sentencing a prisoner, (3) in connection with police work and criminal investigation, (4) in connection with employment, (5) in connection with inquiries concerning the character, honesty, and credit of an individual.

In all of the above enumerated instances, it is proper to use a record of convictions for a misdemeanor, and in each of those instances it is helpful to those with a legitimate interest to have this information available. Youthful indiscretions, traffic violations, and various breaches of discipline which do not involve

moral turpitude do not weigh heavily with anyone either at the time of the offense or seven years later. For the good of society such offenses must be dealt with. No one seriously suggests that the record of such is the equivalent of the practice of branding the felon (or misdemeanant) with a letter denoting his crime. As these records serve a necessary purpose in our society, we should have reference to them for adequate cause.

A BANK AND ITS SOUNDNESS

HOUSE . . . (1967) . . . No. 8

AN ACT PERTAINING TO THE IMPAIRMENT OF A BANK'S CAPITAL OR DEPOSITS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 167 of the General Laws is hereby amended by adding
- 2 after section 5A the following new section:—
- 3 Section 5B. Any person who braoadcasts by word of mouth or
- 4 otherwise any information concerning the affairs of a bank which
- 5 results or could result, in the opinion of the commissioner, in
- 6 threatening the solvency of such bank shall be punished by a
- 7 fine of one thousand dollars or by imprisonment for one year, or
- 8 both.

Under the proposed legislation it would appear that the trustee or director of a bank, who found a serious condition in the affairs of the institution, and who informed parties with a legitimate interest of such a condition, could be fined or imprisoned. We believe that the legislation is so loosely drawn that it is of no value at all.

Presumably the proponents of such legislation intended to provide that one who recklessly or falsely states that a bank is about to fail should be subject to a criminal penalty.

If such a law was desirable, the question of the constitutional guarantee of free speech should be considered also. One who broadcasts by word of mouth or otherwise that a bank is not sound may have a right to his opinion, and may have a right to

express it. It would seem to us that if the Commissioner of Banks should present a bill which would be limited to the situation where a false or exaggerated representation is made, with a lack of good faith, and for ulterior purposes, some constitutionally sound proposal might be worked out.

We definitely oppose the bill as filed.



**A REVIEW OF PROGRESS IN  
“WORK RELEASE”**

**HOUSE . . . (1967) . . . No. 3150**

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AN ACT TO PERMIT JUSTICES TO ORDER A JAIL SENTENCE TO BE SERVED DURING  
CERTAIN HOURS IN MISDEMEANOR CASES.

*Be it enacted by the Senate and House of Representatives in General Court  
assembled, and by the authority of the same, as follows:*

1 Chapter 279 of the General Laws is hereby amended by in-  
2 serting after section 6, as amended by chapter 770 of the acts  
3 of 1955, the following section:—

4 Section 6A. Whoever is convicted of a misdemeanor punish-  
5 able by imprisonment may be ordered by the justice to serve his  
6 sentence during such hours as will permit said person to con-  
7 tinue his employment. Such order shall be in the discretion of  
8 the court.

In our 40th Report for 1964 at page 39, we indicated a lack of support for legislation which would have permitted persons convicted of non-support to serve sentences during the hours beginning 6:00 p.m. Friday and ending 6:00 p.m. Sunday. This procedure would have allowed such persons to continue their employment. The bill referred in 1967, House 3150 would fall into the same category as the earlier 1964 proposal.

Imprisonment is ordered by the court as a last resort. If there is any possibility, a suspended sentence is imposed.

Correction authorities in Massachusetts look with more favor on the program where supervision of the offender can be maintained on a continuing basis during a period of incarceration. This is accomplished well under the “Work-Release” program introduced by Chapter 803 of the Acts of 1965. This legislation originally provided that the sheriffs in Barnstable, Norfolk and Plymouth counties:—

“may establish a work release program under which persons sentenced to the house of correction, except sex offenders and persons sentenced for acts of violence, may be granted the privilege of leaving actual confinement during necessary and reasonable hours for the purpose of working at gainful private employment within the commonwealth. Such programs may also include under appropriate conditions, release for the purpose of seeking such employment.”

A highly favorable report on the Barnstable County Work Release program was made by Sheriff John D. Courtney, Jr. in the Berkshire Eagle, July 21, 1967. This report indicated that starting on July 28, 1966, in the first year of the program, 18 inmates, selected by a five member screening committee, were reported by Corrections Officer Richard H. Smith to have made the following record, with one escapee picked up the day after he had made a break on Christmas Eve.

#### NET EARNINGS OF PRISONERS

Paid to Welfare Boards for dependents .....	\$ 1,525.00
Paid to City Treasurer for Room & Board .....	2,215.00
Savings for Release .....	6,984.00
	<hr/>
	\$10,724.00
Add Income Taxes paid to State and Federal .....	1,976.00
Total Gross Earnings of 18 inmates for the year:— .....	<hr/>
	\$12,700.00

### Norfolk County

Sheriff Charles W. Hedges of the County of Norfolk reports extremely worthwhile results for the period beginning April 18, 1966 when the program commenced to August 28, 1967. His report can be summarized as follows:—

#### NORFOLK COUNTY HOUSE OF CORRECTION April 18, 1966 to August 28, 1967

Number of Inmates in the Work Release Program ..	107
Number of Employer Firms Participating .....	29
Total net "Take Home" pay earned in the period ...	\$62,183.19
Voluntary payments by inmates to their families ...	8,382.57
Payments to Welfare, A.D.C. and other obligations .	1,010.00
Paid Massachusetts Motor Vehicle Excise Taxes ...	142.57
Fines Paid by Inmates (Imposed by Court) .....	998.00
Paid to County of Norfolk for Board and Room ...	16,566.00
Savings Paid over to 88 inmates at the time of their release. ....	<hr/>
	\$22,071.00

Sheriff Hedges stresses the point that the money available to the prisoner at the time of his discharge, earned through his

own work, enables him to maintain himself at the critical time when he leaves the institution seeking work outside. With the funds he has earned he can get a place to live and have some money to maintain himself while he seeks a job which is suitable for his abilities. Sheriff Hedges also pointed out that the inmates were carefully selected and that the trust placed in them was reciprocated by these inmates who expressed gratitude for being given an opportunity to demonstrate their "responsibility".

"Even though the program is still in its infancy", said Hedges, "our experience clearly indicates the system is a sound middle ground between incarceration and probation. It retains most of the aspect of family support and maintenance. Occasionally total jail custody fails as it offers little beside punitive confinement with its attendant idleness — and as such, can be regarded as individual 'cold storage.'"

In his remarks to our inquiry Sheriff Hedges also said:—

"Records will show that at times probation obtains limited results, for the offender is allowed, and in some cases, forced to maintain his old inadequate life structure and environment.

The Work-Release Program provides a changed atmosphere, a good-paying steady job which can interrupt, alter and conceivably halt old patterns and aid in establishing new and more lasting effective ones.

Those of us closely identified with this new and amazing program are tremendously impressed by its success, based principally on the relationship between the participants and ourselves. No longer are we regarded as 'screws,' but more as confidante's, counsellors, big brothers, yes, even as members of their own families.

Without the complete cooperation and understanding of Personnel Directors in local factories, Union Officials, etc., as well as others who hired one or more of our participants, such success could not have been achieved.

Problems and obstacles have arisen, which through the excellent cooperation and close supervision by Deputy Master Henry E. Hansen, Work-Release Supervisor Joseph Lyons, Comptroller Peter Robinson, and all other loyal officers, we have met, with the exception of the physical establishment. A separate and self-supporting building, or isolated area, away from other inmates is essential to orderly progress. Due to our ancient facility, we unfortunately must limit the number of participants to fifteen (15). We could easily have forty (40) to fifty (50) men out daily, if there was a segregated area available."

Work release programs have been spreading rapidly. Since 95% of sentenced offenders, including almost all of those serving jail sentences, will be returned eventually to society and since up to 60% of released offenders return to crime, it is important to "develop programs that will make first offenders last offenders. \* \* \* 'The basic objective of work release is to build a bridge of self respect and responsibility between abnormal prison life and normal community living.' " See Randell, The Oregon Work Release Program, 6 Trial Judges Journal 15, April 1967, #2.

Such programs now exist in at least 24 other states and in the federal Bureau of Prisons. The federal experience under the Prisoner Rehabilitation Act of 1965 (18 U.S.C. §4082) from the inception of the program in October, 1965 to April 1, 1967, is summarized in a Bureau of Prisons Memorandum of May 5, 1967 as follows:

Placed in work release program .....		2,595
Removed — Released from institution .....	1,290	
Removed — Escaped .....	125	
Removed — Disciplinary problem .....	247	
Removed — Other .....	361	2,023
		<hr/>
In work release program 4/1/67 .....		572
Net earnings:		
Remitted to dependents .....	445,389	
Expenses where employed .....	718,195	
Food & Lodging reimbursement to U.S.		
Gov't (@ \$2 day) .....	267,896	
Savings for release .....	753,600	2,224,904
		<hr/>
Taxes paid (income, local, S. Sec., etc.) .....		368,761
		<hr/>
Gross earnings .....		\$2,596,665

There is much material available about desirable policies and procedures for work release programs. The federal enabling act (18 U.S.C. §4082) has been implemented by the U.S. Bureau of Prisons Policy Statement 7500.20A dated April 4, 1967.

We favor permissive extension of work release programs in Houses of Correction to all counties. But we do not support H. 3150, which would give the sentencing justice discretion to order work release from any House of Correction for the purpose of continuing an inmate's presentence employment only.



The success of any work release program is contingent on willing administration by the correctional authorities and careful development of community acceptance. See report of U.S. Bureau of Prisons Task Force, "Special Project on Work Release

2," Oct. 25, 1966. We believe that the final authority for authorizing work release for a specific inmate in a House of Correction should remain with the Sheriff of his county, and that the sentencing justice should be permitted only to recommend work release.

We have reviewed this subject in order to demonstrate that we believe that Massachusetts correction authorities have a new and useful method to assist in prisoner rehabilitation in those cases where such rehabilitation can be used. The "Work Release" program can now be used in all of our counties except Suffolk by Chapter 821 of the Acts of 1967.

## CHAPTER 821 — ACTS OF 1967

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AN ACT PROVIDING FOR WORK RELEASE PROGRAMS IN HOUSE OF CORRECTION.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 127 of the General Laws is hereby amended by inserting after section 86E, inserted by chapter 723 of the acts of 1967, the following section:—

*Section 86F.* The sheriff of any county, except the sheriff of Suffolk county, may establish a work release program under which persons sentenced to the house of correction, except sex offenders, may be granted the privilege of leaving actual confinement during necessary and reasonable hours for the purpose of working at gainful employment within the commonwealth. Such program may also include, under appropriate conditions, release for the purpose of seeking such employment and obtaining educational training in connection therewith. Any such inmate may apply to the sheriff for permission to participate in such program. The application shall include a statement by the inmate that he agrees to abide by all terms and conditions of the particular plan selected for him by the sheriff, and shall state the name and address of the proposed employer and all such other information as the sheriff may require. The sheriff may approve, disapprove, or defer action on such application. If the sheriff approves the application, he shall select a work release plan for the inmate which shall contain such terms and conditions as may be necessary and proper; such plan shall be signed by the inmate, the sheriff and the employer, prior to participation in the program by the inmate. At any time after

approval has been granted it may be revoked at will by the sheriff.

An inmate and his employer shall agree to deliver his total earnings, minus tax and similar deductions, to the sheriff. At no time shall any inmate personally receive any monies, checks or the like from his employer. The sheriff shall deduct from the earnings delivered to him the following:—

First, an amount determined by the sheriff for substantial reimbursement to the county for providing food, lodging and clothing for such inmate; second, the actual and necessary food, travel and other expenses of such inmate when released for employment under the program; third, the amount for support of his wife and children as ordered by any court; fourth, the amount arrived at with public welfare departments; fifth, sums voluntarily agreed to for family allotments and for personal necessities while confined. Any balance shall be credited to the account of the inmate and shall be paid to him upon his final release.

No inmate shall be deemed to be an employee of the county under chapter one hundred and fifty-two while participating in a work release program.

The sheriff shall appoint a work release supervisor who shall be placed by the county personnel board in Grade 15, whose duties shall consist of participant screening, employer interviewing, collection of monies, keeping of records, procurement of positions and similar duties assigned by the sheriff.

All such inmates shall, when so employed by the day, be fed, housed and supervised in a separate place or part of the house of correction, and segregated from all other inmates not so employed. Any inmate participating in such work release program and permitted to leave his place of confinement for the purpose of working in gainful employment, as herein provided, who leaves his place of employment without permission of his employer and with the intention of not returning to his place of confinement, or who having been ordered by the sheriff or the work release supervisor to return to his place of confinement neglects or refuses to do so, shall be held to have escaped from such house of correction, and shall be arrested and returned to such house of correction, and, upon conviction of such escape, shall be sentenced for a term not to exceed one year or the term for which he was originally sentenced, whichever is the lesser.

The expense of the arrest and return of any such inmate shall be paid in the same manner as the expense of the arrest and return of an inmate who escapes from a house of correction.

Nothing in this act shall be construed to affect eligibility for release or parole.

SECTION 2. Chapter eight hundred and three of the acts of nineteen hundred and sixty-five is hereby repealed.

## Programs for Other Prisoners

Under the provisions of Chapter 723 of the Acts of 1967 approved November 6, 1967 the "Work Release" program was extended to the state prison and the correctional institution at Concord. Excluded from the program are those convicted of certain crimes against the person such as robbery, rape, assault etc; certain sex offences, and those serving life sentences.

## CHAPTER 723 — ACTS OF 1967

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AN ACT TO PERMIT DAY WORK OUTSIDE THE STATE PRISON AND THE MASSACHUSETTS CORRECTIONAL INSTITUTION, CONCORD, BY CERTAIN INMATES THEREOF.

*Be it enacted, etc., as follows:*

Chapter 127 of the General Laws is hereby amended by inserting after section 86C the following two sections:—

*Section 86D.* The commissioner of correction, subject to rules and regulations established in accordance with the provisions of this section, may permit an inmate sentenced to the state prison or to the Massachusetts Correctional Institution, Concord, except an inmate serving a life sentence or a sentence for a violation of section thirteen, thirteen B, fourteen, fifteen, fifteen A, fifteen B, sixteen, seventeen, eighteen, eighteen A, nineteen, twenty, twenty-one, twenty-two, twenty-two A, twenty-three, twenty-four, twenty-four B, twenty-five or twenty-six of chapter two hundred and sixty-five, or section seventeen, thirty-four, thirty-five or thirty-five A of chapter two hundred and seventy-two or for an attempt to commit any crime referred to in said sections, who consents thereto, to be employed by the day outside the precincts or dependencies of said prison or institution. The commissioner shall, with the approval of the governor, establish rules and regulations to govern the administration of said day work and may, with like approval, amend, annul or repeal said rules and regulations. Said rules and regulations shall provide for reasonable periods of confinement to said prison or institution before an inmate may be permitted to engage in day work under this section, shall designate the form of permit by which an inmate shall be employed in day work under this section, shall establish the conditions of agreements to be entered into by an employer of an inmate engaged in day work under this section, and shall provide (a) that no inmate shall be employed at wages less than those paid by his employer to noninmate employees doing similar work, and (b) that no inmate shall be employed at a place where there exists any strike or stoppage of employment arising from any dispute over wages, working conditions, union security or from a labor dispute of any kind.

All such inmates shall, while so employed by the day, be fed, housed and supervised in a separate place or part of said prison or institution and segregated from all other inmates not so employed.





6 shall mean a minor who has reached the age of seventeen years  
7 or over but has not reached the age of twenty-one years;  
8 and the term "youthful offender" shall mean a youth who has  
9 committed a crime not punishable by death or life imprison-  
10 ment, who has not previously been convicted of a felony, and  
11 who is adjudged a youthful offender pursuant to the provi-  
12 sions of the following sections.

13 *Section 2. (a)* In any criminal proceedings or on indict-  
14 ment or complaint against a youth for any offense against  
15 the law of the commonwealth or for a violation of any city  
16 ordinance or town by-law, the court having jurisdiction of  
17 the offense or violation if convinced beyond a reasonable  
18 doubt of the guilt of the defendant and after a finding or  
19 verdict of guilt may, before imposing sentence in such case,  
20 conduct a hearing to determine whether such person is a fit  
21 subject to be adjudicated and treated as a youthful offender.

22 *(b)* If at the conclusion of the hearing provided by clause  
23 *(a)* or of any adjournment thereof, the court shall be of the  
24 opinion that the youth is not a fit subject for adjudication  
25 and treatment as a youthful offender, the court shall impose  
26 a sentence or make such other disposition as is provided by  
27 law for such offense or violation.

28 *(c)* If at the conclusion of the hearing provided by clause  
29 *(a)* or of any adjournment thereof, the court shall be of  
30 opinion that the person is a fit subject for adjudication and  
31 treatment as a youthful offender, the court shall adjudicate  
32 him as a youthful offender. The defendant before or after  
33 the hearing provided by clause *(a)* may refuse to be adjudged  
34 a youthful offender and elect to be sentenced under the  
35 original complaint or indictment.

36 *(d)* The determination and finding by a court that a person  
37 is not a fit subject for adjudication and treatment as a youth-  
38 ful offender shall be a matter for its sole discretion.

39 *Section 3.* If the defendant enters a plea of guilty to the  
40 charge of being a youthful offender or if, after trial, the  
41 court shall find that he committed the acts charged against  
42 him in the indictment or complaint, the court may adjudge the  
43 defendant to be a youthful offender and this, if accepted by  
44 the defendant, shall be a final disposition of the indictment or  
45 complaint.

46 *Section 4.* Pending and during the investigation, trial, adju-  
47 dication or acquittal of the defendant, or any other proceed-  
48 ings hereunder, the court shall have the same powers over  
49 the person of the defendant as it would have in the case of  
50 an adult charged with crime.

51 *Section 5.* The court upon the adjudication of any person as  
52 a youthful offender, under this chapter may (1) fine, as pro-  
53 vided by law for the offense initially charged, (2) commit  
54 the youth to Massachusetts Correction Institution, Concord,

55 or to such other facility of the department of correction as  
56 may be developed by the department specifically for the  
57 training and rehabilitation of youthful offenders; youthful  
58 offenders so committed to Massachusetts Correctional Insti-  
59 tution, Concord, shall be eligible for parole and supervision  
60 by parole board in accord with provisions applicable to  
61 adult offenders, (3) impose sentence and suspend its execu-  
62 tion, or (4) place him on probation for any term not to  
63 exceed his twenty-first birthday; provided, however, that  
64 the court in its discretion may from time to time, while  
65 such probation is in force, extend such probation not to  
66 exceed his twenty-second birthday. From any sentence of  
67 commitment imposed under this section by a district court  
68 judge on a person adjudged a youthful offender, said youthful  
69 offender shall have the right to appeal to the superior court.  
70 In no event shall such sentence be in excess of that pro-  
71 vided for in original complaint or indictment. Commitment  
72 hereunder shall be for a period not to exceed his twenty-first  
73 birthday except that when adjudication made is subsequent  
74 to youth's twentieth birthday, commitment may run to his  
75 twenty-second birthday.

76 *Section 6.* If a youth who has been placed in care of a pro-  
77 bation officer is alleged to have violated his probation, said  
78 officer, at any time before the final disposition of the case,  
79 may arrest such youth without a warrant and take him before  
80 the court, or the court may issue a warrant for his arrest.  
81 When such youth is before the court, it may make any dis-  
82 position of the case which it might have made before said  
83 youth was placed on probation, or may continue or extend  
84 the period of probation.

85 *Section 7. (a)* Records in cases brought against any youth  
86 under this chapter shall not be admissible in evidence or used  
87 in any way in any court proceedings, except in imposing sen-  
88 tence in any subsequent criminal proceedings against the same  
89 person; and except for adjudications which parallel those set  
90 forth under section fifty-eight B of chapter one hundred and  
91 nineteen, nor shall such adjudication or disposition or evi-  
92 dence operate to disqualify a youthful offender in any future  
93 examination, appointment, or application for public service  
94 under the government either of the commonwealth or of  
95 any political subdivision thereof.

96 *(b)* The records of any youth adjudicated a youthful  
97 offender, including fingerprints, photographs and physical  
98 descriptions shall not be open to public inspection. But, such  
99 records as required under section ninety-nine and section  
100 one hundred of chapter two hundred and seventy-six, shall  
101 be submitted to the commissioner of probation. Such records  
102 shall be retained as confidential matter and kept in the same  
103 manner as juvenile offenders. The court in its discretion, in

104 any case, may permit an inspection of any of its papers or  
105 records.

106 *Section 8.* The age of the youthful offender at the time of  
107 the commission of the crime alleged shall determine whether  
108 he is eligible to the benefits herein provided.

1 SECTION 2. Section 33 of chapter 279 of the General Laws,  
2 as most recently amended by section 12 of chapter 308 of  
3 the acts of 1964, is hereby further amended by adding the  
4 following sentence:—If sentenced to said reformatory as a  
5 youthful offender he may be held therein for a period not to  
6 exceed his twenty-first birthday except when sentence is  
7 subsequent to his twentieth birthday, he may be held for a  
8 period not beyond his twenty-second birthday.

We received this bill after we had concluded our regular deliberations and discussions for the year. It is far too important a matter for us to make any recommendations without an opportunity for full discussion.

Obviously, this bill deals with the age bracket where we can see statistically that most of the large volume of offenses is involved. In some jurisdictions efforts are made to treat youthful offenders as a distinct group. We cut off the jurisdiction of the juvenile courts at the age of seventeen, but few if any regard those under twenty-one as mature adults.

If separate treatment of youthful offenders will mean that there is a better chance of re-directing the energies of certain members of this substantial part of our society who have run afoul of the law, we should give careful attention to it.

We will retain this matter and make a full report on it in our 44th report for 1968, or make a special report on the matter if this seems desirable or necessary in the opinion of the governor or the General Court.

# V. EVIDENCE

## Confidential Communications

### SENATE . . . (1967) . . . No. 439

AN ACT TO PROTECT PATIENTS' CONFIDENTIAL COMMUNICATIONS TO PSYCHIATRISTS AND OTHER PSYCHOTHERAPISTS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 233 of the General Laws is hereby further amended  
2 by inserting after Section 20A the following new Section  
3 20B:—

4 Section 20B. As used in this act, "patient" means a person  
5 who, during the course of diagnosis or treatment, communi-  
6 cates with a psychotherapist; "psychotherapist" means a per-  
7 son licensed to practice medicine who devotes a substantial  
8 portion of his time to the practice of psychiatry, or a person  
9 by training and experience skilled in the diagnosis and treat-  
10 ment of mental or emotional problems, or a person reasonably  
11 believed by the patient to be qualified under either of these  
12 headings; "authorized representative" means a person em-  
13 powered by the patient to assert the privilege granted by this  
14 act and, until given permission by the patient to make dis-  
15 closure, any person whose communications are made privi-  
16 leged by this act; "communications" includes conversations,  
17 correspondence, actions, and occurrences relating to diagnosis  
18 or treatment, before, during or after institutionalization, re-  
19 gardless of the patient's awareness of such conversations, cor-  
20 respondence, actions, and occurrences, and any records, mem-  
21 oranda, or notes of the foregoing.

22 Except as hereinafter provided, in civil, criminal, and ju-  
23 venile cases, in proceedings preliminary thereto, and in legis-  
24 lative and administrative proceedings, a patient, or his au-  
25 thorized representative, has a privilege to refuse to disclose  
26 and to prevent a witness from disclosing communications  
27 wherever made relating to diagnosis or treatment of the  
28 patient's mental or emotional condition between patient and  
29 psychotherapist, or between members of the patient's family  
30 and the psychotherapist, or between any of the foregoing  
31 and such persons who participate, under the supervision of,  
32 or in cooperation with, the psychotherapist in the accomplish-  
33 ment of the objectives of diagnosis or treatment.



34 When a patient is incompetent to assert or waive the privi-  
35 lege, a guardian shall be appointed and shall act in place of  
36 the patient under this act. A previously appointed guardian  
37 shall be authorized to so act.

38 Upon the exercise of the privilege granted by this act, the  
39 judge or presiding officer shall upon the request of the patient  
40 instruct the jury that no adverse inference may be drawn  
41 from the assertion of the privilege.

42 There shall be no privilege for any relevant communica-  
43 tions under this act:

44 (a) When a psychotherapist, in the course of diagnosis or  
45 treatment of the patient, determines that the patient is in  
46 need of treatment in a hospital for mental or emotional illness,  
47 or that there is a threat of imminently dangerous activity by  
48 the patient against himself or another person, and on the basis  
49 of such determination finds it necessary to disclose such com-  
50 munications either for the purpose of placing or retaining the  
51 patient in such a hospital (provided however that the pro-  
52 visions of this act shall continue in effect after the patient is  
53 in said hospital), or placing the patient under arrest or under  
54 the supervision of law enforcement authorities.

55 (b) If a judge finds that the patient, after having been  
56 informed that the communications would not be privileged,  
57 has made communications to a psychotherapist in the course  
58 of a psychiatric examination ordered by the court, provided  
59 that such communications shall be admissible only on issues  
60 involving the patient's mental or emotional condition but not  
61 confessions or admissions of guilt.

62 (c) In all proceedings, except those involving child custody,  
63 in which the patient introduces his mental or emotional con-  
64 dition as an element of his claim or defense, and the judge or  
65 presiding officer finds that it is more important to the interests  
66 of justice that the communication be disclosed than that the  
67 relationship between patient and psychotherapist be protected.

68 (d) In all proceedings after the patient's death in which  
69 the patient's mental or emotional condition is introduced by  
70 any party claiming or defending through or as a beneficiary  
71 of the patient as an element of the claim or defense, and the  
72 judge or presiding officer finds that it is more important to  
73 the interests of justice that the communication be disclosed  
74 than that the relationship between patient and psychotherapist  
75 be protected.

76 (e) In child custody cases in which either party raises the  
77 mental condition of the other party as part of a claim or de-  
78 fense, and the psychotherapist believes that disclosure is neces-  
79 sary because the patient's mental condition seriously impairs  
80 the patient's ability to care for the child, and thereafter makes  
81 such disclosure to the judge *in camera*; and the judge then con-  
82 siders that the patient's mental or emotional condition would  
83 in fact seriously impair the patient's ability to provide suitable

84 custody, and that it is more important to the interests of  
85 justice that the communication be disclosed than that the  
86 relationship between patient and psychotherapist be protected.  
87 (f) In all proceedings brought by the patient against the  
88 psychotherapist, and in all malpractice, criminal or license  
89 revocation proceedings, in which disclosure is necessary or  
90 relevant to the claim or defense of the psychotherapist.

Many persons are of the opinion that statements made in confidence to a physician or a psychiatrist are privileged. In a recent study in the *Archives of General Psychiatry*, Vol 15, December 1966. pp 619-623. Dr. Eugene Balcanoff of Needham, Massachusetts and his co-author, Dr. Suarez of Los Angeles, observe:—

A questionnaire survey of attitudes and experiences in the area of privileged communication was sent to all the psychiatrists in Massachusetts. Replies were received from 487 (63.3%) of these. The psychiatric profession strongly favors a statute in this area, though there is more marked disagreement as to what other mental health personnel should also be covered, and also as to what exceptions should be delineated from an ideal statute. In terms of experience (past five years), nine cases were cited in which either records or intimate testimony were obtained forcefully from the psychiatric witness."

In the nine cases noted, psychiatric records were summoned into court on 5 occasions, and in the other four cases the psychiatrists "were forced to reveal intimate material against their wishes." Some 18 other courtroom cases were studied by the medical investigation team which drew a conclusion that proponents of the statutory privilege took the position that a small number of cases (known) was indicative of the need for "reform now".

They admitted that others might argue that there was no real present abuse.

This study was initiated by the Boston University Law Medicine Institute and among the interesting facts developed was the statistic that one of every four psychiatrists in Massachusetts was not aware that what was said to him in confidence could be pried loose from him on the witness stand.

In our 42nd Report for 1966 at page 62 we discussed the law of privilege as it applied to school psychologists and counsellors. We pointed out the only statutory protection for such information was:—

Chapter 233 Sec. 23B	—An accused who makes a statement of his guilt to a psychiatrist under the mandatory psychiatric examination under Chapter 123 Sec. 100-100A.
Chapter 6 Sec. 84	Vocational Rehabilitation Records.
Chapter 151A Sec. 46	Information under the Employment Security Law.

The proposed grant of privilege would place the psychiatrist and the *psychotherapist* in the same class as a clergyman and attorneys.

The extension of the privilege to clergy (Chapter 233 Sec. 20A) is recent. There are other privileged communications in Massachusetts such as the private communications between husband and wife, deliberations of jurors, and judicial officers, informers to the prosecutor, certain tax returns, certain birth and marriage records, and reports to the Industrial Accident Board and certain other agencies.

For those who seek the aid of the psychiatrist in addition to the priest, minister, or rabbi (or possibly in lieu of the clergy) it is argued that assistance can best be given if there is an assurance that the disclosures will never be repeated. It is not professional for the psychiatrist to reveal this information on a voluntary basis except in those instances where the good of the patient, or the greater good of society clearly demands it.

### **The Classical Test of the Proposal**

According to the pre-eminent authority in the law of evidence, Prof. Wigmore, there are certain conditions which should be fulfilled before enactment of a statute which would extend the coverage of the privileged communication. The oft quoted conditions are these:—

1. The communication must originate in a confidence that it (the communication) will not be disclosed.
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would result to the confidential relationship of the parties must be greater than the benefit that would be gained if the confidence was breached for the correct disposal of adjudication of the litigation.

We have found it difficult to accept the fact that such principles are applicable to those who are known as "*psychotherapists*". This group includes not only psychologists but a host of others including social case-workers, psychiatric social workers, marriage counsellors (some of whom advertise on their business cards as "*psychotherapists*") and many other persons active in very personal human relations.

This bill would *not* include the regular medical doctor (unless engaged in psychotherapy) as it is said that there is little in the way of physical symptoms and conditions that is usually kept confidential. It is also generally held that the harm done (particularly in court) by suppressing the truth and sealing the medical man's lips, is far greater than the benefit from a privilege for the physician.

A recent survey indicates that the privilege is given:—

(a) To psychiatrists (M.D.) in five states, including Connecticut, Florida, Georgia, Illinois, and Maryland.

(b) To Psychiatrists and Psychologists; Florida and Illinois.

(c) To Psychologists: nineteen states including California, Illinois, Michigan, New Hampshire, New York.

Communications to a psychiatrist meet the tests set down by Wigmore, in our opinion. Whether others might also qualify under these tests, we do not conclude at this time for the reason that we are of the opinion that the granting of the privilege should be done on a limited basis as was done in Connecticut.

In our re-draft of the bill we have eliminated psychotherapists and all others save for the psychiatrist who is defined as a person licensed to practice medicine who devotes a substantial portion of his time to this particular special branch of the profession.

The statute provides for those instances where such a privilege would not be in the interests of society. Here we find that Wigmore's fourth requirement is not met unless this is done.



There are those who urge the extension of the privilege to others.

It is doubtful that the opinion of the community is that the relation between a social worker and his "client" ought to be "sedulously fostered" to the extent that what passes between them is deserving of the seal of silence during judicial proceedings when society seeks the truth.

It has been said in *Taylor v. United States*, 222 Federal Reported (2d) 398, at page 401:—

Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him."

We recommend the following:—

### 1968 DRAFT ACT

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#### AN ACT TO PROTECT PATIENTS' CONFIDENTIAL COMMUNICATIONS TO PSYCHIATRISTS.

1 Chapter 233 of the General Laws is hereby further amended  
2 by inserting after Section 20A the following new Section  
3 20-B:—

4 SECTION 20-B. As used in this act, "patient" means a per-  
5 son who, during the course of diagnosis or treatment, com-  
6 municates with a person licensed to practice medicine who  
7 devotes a substantial portion of his time to the practice of psy-  
8 chiatry; "authorized representative" means a person empowered by  
9 the patient to assert the privilege granted by this act and, until  
10 given permission by the patient to make disclosure, any per-  
11 sons whose communications are made privileged by this act;  
12 "communications" includes conversations, correspondence,  
13 actions, and occurrences relating to diagnosis or treatment,  
14 before, during or after institutionalization, regardless of the  
15 patient's awareness of such conversations, correspondence, ac-  
16 tions, and occurrences, and any records, memoranda, or notes  
17 of the foregoing.

18 Except as hereinafter provided, in civil, criminal, and juve-  
19 nile cases, in proceedings preliminary thereto, and in legisla-  
20 tive and administrative proceedings, a patient, or his author-  
21 ized representative, has a privilege to refuse to disclose and to  
22 prevent a witness from disclosing communications wherever  
23 made relating to diagnosis or treatment of the patient's men-  
24 tal or emotional condition between patient and psychiatrist.

25 When a patient is incompetent to assert or waive the privi-  
26 lege, a guardian shall be appointed and shall act in place of

27 the patient under this act. A previously appointed guardian  
28 shall be authorized to so act.

29 Upon the exercise of the privilege granted by this act, the  
30 judge or presiding officer shall upon the request of the patient  
31 instruct the jury that no adverse inference may be drawn from  
32 the assertion of the privilege.

33 There shall be no privilege for any relevant communica-  
34 tions under this act:

35 (a) When a psychiatrist, in the course of diagnosis or treat-  
36 ment of the patient, determines that the patient is in need of  
37 treatment in a hospital for mental or emotional illness, or that  
38 there is a threat of imminently dangerous activity by the pa-  
39 tient against himself or another person, and on the basis of  
40 such determination finds it necessary to disclose such com-  
41 munications either for the purpose of placing or retaining the  
42 patient in such a hospital (provided however that the provisions  
43 of this act shall continue in effect after the patient is in said  
44 hospital), or placing the patient under arrest or under the super-  
45 vision of law enforcement authorities.

46 (b) If a judge finds that the patient, after having been in-  
47 formed that the communications would not be privileged, has  
48 made communications to a psychiatrist in the course of a psy-  
49 chiatric examination ordered by the court, provided that such  
50 communications shall be admissible only on issues involving  
51 the patient's mental or emotional condition but not confessions  
52 or admissions of guilt.

53 (c) In all proceedings, except those involving child custody,  
54 in which the patient introduces his mental or emotional con-  
55 dition as an element of his claim or defense, and the judge or  
56 presiding officer finds that it is more important to the interests  
57 of justice that the communication be disclosed than that the  
58 relationship between patient and psychiatrist be protected.

59 (d) In all proceedings after the patient's death in which the  
60 patient's mental or emotional condition is introduced by any  
61 party claiming or defending through or as a beneficiary of the  
62 patient as an element of the claim or defense, and the judge  
63 or presiding officer finds that it is more important to the in-  
64 terests of justice that the communication be disclosed than that  
65 the relationship between patient and psychiatrist be protected.

66 (e) In child custody cases in which either party raises the  
67 mental condition of the other party as part of a claim or de-  
68 fense, and the psychiatrist believes that disclosure is necessary  
69 because the patient's mental condition seriously impairs the  
70 patient's ability to care for the child, and thereafter makes  
71 such disclosures to the judge *in camera*; and the judge then  
72 considers that the patient's mental or emotional condition  
73 would in fact seriously impair the patient's ability to provide  
74 suitable custody, and that it is more important to the interests  
75 of justice that the communication be disclosed than that the  
76 relationship between patient and psychiatrist be protected.

77 (f) In all proceedings brought by the patient against the  
78 psychiatrist, and in all malpractice, criminal or license revoca-  
79 tion proceedings, in which disclosure is necessary or relevant  
80 to the claim or defense of the psychiatrist.

PROOF IN LIBEL AND SLANDER

HOUSE . . . (1967) . . . No. 1434

AN ACT CHANGING THE BURDEN OF PROOF IN LIBEL AND SLANDER ACTIONS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 231 of the General Laws is hereby amended by
- 2 adding thereto the following section:—
- 3 *Section 1B.* In any action for slander or libel, the defense
- 4 that the alleged defamatory statements were privileged shall
- 5 be affirmatively pleaded and the defendant shall have the
- 6 burden of proving, under this defense, that the statements were
- 7 made without malice and with reasonable cause to believe the
- 8 truth thereof.

The first requirement in the consideration of this bill is to make the distinction between libel and slander. In the development of the law, libel was a written defamation while slander was oral. Slander was considered of less consequence because this variety of defamation was not permanent. Libel, written, printed, recorded on tape or records, photographed or otherwise made a lasting defamatory footprint on the sands of time, stands on a higher plane.

Attempts have also been made to distinguish libel from slander in another way. Defamation by radio or television may be impermanent but because of the wide-spread dissemination of the message, it is argued that the rules applicable to a newspaper (which preserves its opinions in print) should apply to radio and television.

One accused of libel or slander usually defends on the basis of (1) privilege, or (2) Truth, or possibly on both grounds.

“Privilege” means that the advancement of some higher duty or social obligation excuses the defamatory statement. A judge or a legislator has such a privilege or immunity.

“Truth” has been a complete defense to libel and slander in

a great many states of the United States. News media have a qualified privilege of "Fair Comment".

House (1967) No. 1434 would place a new section "91B" (not Sec. 1) of Chapter 231 which would deal with the defense of "Privilege". The plea of Privilege can now be destroyed if the plaintiff shows malice in a libel case.

Chapter 231 Section 91 now provides, in regard to the defense of "Truth" that if the defendant tries to justify his defamation on the basis that he spoke the truth, his failure to prove truth shall not be equivalent to proof of malice. Section 92 of Chapter 231 provides:—

The defendant in an action for writing or publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless malice is proved."

In the case of *Bander vs. Metropolitan Life Insurance Company*, 313 Mass. 337, at page 342, it was said:—

Truth is a complete defence to an action for slander, *Golderman v. Stearns*, 7 Gray 181, 183. *Comerford v. Meier*, 302 Mass. 398, 402. The provision of G.L. (Ter. Ed.) Chapter 231 Sec. 92, by force of which actual malice deprives a defendant of the benefit of this defence in an action for libel does not apply to an action for slander. The burden of proving truth as a defence rests upon the defendant. *Maloof v. Post Publishing Company*, 306 Mass. 279, 280."

Publication in a newspaper that an attorney was "committed" to the Medfield State Hospital was held not to constitute libel when it was demonstrated that such was the truth, and where there was no actual malice on the part of the publisher. If the attorney had proved malice on the part of the newspaper, truth would not have helped the newspaper publisher.

Under the present state of the law, in a libel case, the defense of privilege can be overcome by showing malice. If the privilege amounts to immunity, such as the immunity of a member of the General Court speaking on the floor of the House, even malice does not destroy the defense.

In a slander case there may be a defamation under circumstances which afford a defense of *privilege* even where the charge proves untrue.



In *Galvin V. New York, N.H. & H Ry. Co.* 341 Mass. 293, railroad police made repeated (false) accusations that Galvin had been involved in a theft. The court held that the privilege is not absolute but conditional, and that the railroad police had a privilege to make the accusation as part of their investigation, the constant repetition of the accusation in the presence of fifty employees was an abuse of the privilege and destroyed it. The element of malice could be inferred from the conduct of the police.

Into this not altogether satisfactory atmosphere which surrounds the law of libel and slander, it is suggested that another element be introduced.

Now the injured party sues for defamation.

The defendant sets up a defense of privilege. The privilege must be proved by the defendant.

House (1967) 1434 would now require the defendant not only to prove privilege but to go further and *prove* that there was no malice in the publication of the libel or the utterance of the slander.

Such a concept is something which has plagued the law of defamation from its beginnings but one can see the difficulties in attempting to show to a jury that, as a positive fact, no malice existed at the time of the defamation. It would seem that if the publisher showed a social advantage and demonstrated the action was fair commentary, the burden should shift to the plaintiff to disprove such a position — that is to destroy the defense set up.

House (1967) 1434 would require also that the publisher have a reasonable cause to believe the truth of the defamatory statement.

An attempt has been made to indicate that in slander, a defense of truth would be adequate. The proposed statute confuses the issue in a slander case. In the libel case a defense of truth can even now be destroyed by proof on the part of the plaintiff that the defendant acted with malice. The proposed legislation would therefore require that a defendant in a libel case — such as a newspaper — publish virtually at its peril.

It would not only be required to send forth reporters free from passion and prejudice, but be ready to prove such virtue to the jury as part of its defense. The element of "truth" would move in and out of the case first objectively and later subjectively. In short, the social usefulness of news media and other publications would be adversely affected, and the basic exercise of free speech and fair comment would not be aided.

At present, we would assume that one who did not have reasonable cause to believe that he published the truth could not be found to be free from that malice which would be sufficient to destroy his privilege.

While we recognize the need for improvement in the libel and slander law of this Commonwealth, we do not consider that this bill is an improvement and we do not recommend it.

V. TORTS  
Defects in State Roads

HOUSE . . . (1967) . . . No. 1416

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AN ACT TO FURTHER DEFINE THE LIABILITY OF THE COMMONWEALTH OF MASSACHUSETTS FOR INJURIES SUSTAINED FROM DEFECTS IN BOULEVARDS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       Section 36 of chapter 92 of the General Laws, as amended, is  
2 hereby further amended by striking out the words "constructed  
3 traveled roadway" appearing in the fourth and fifth lines  
4 therein and inserting in place thereof the words — said boule-  
5 vard, — and also by striking out the words "or for injury sus-  
6 tained upon the sidewalk of a boulevard" appearing in the ninth  
7 and tenth lines therein so that said section 36, as amended, will  
8 read as follows:—

9       *Section 36. Liability for Defects in Boulevards, etc.*—The  
10 commonwealth shall be liable for injuries sustained by per-  
11 sons while traveling on any boulevard maintained by the com-  
12 mission under authority of the preceding section, if the same are  
13 caused by defects within the limits of the said boulevard, in the  
14 manner and subject to the limitations, conditions and restric-  
15 tions specified in sections fifteen, eighteen and nineteen of chap-  
16 ter eighty-four, except that the commonwealth shall not be  
17 liable for injury sustained because of the want of a railing in or  
18 upon any boulevard, or during the construction, reconstruction  
19 or repair of such boulevard. Actions seeking to enforce such  
20 rights and remedies shall be brought against the commission as  
21 such but there shall never be any personal liability on the part  
22 of them or any of them to any person injured as aforesaid by  
23 reason of such defect. Notices required to be served upon the de-  
24 fendant in proceedings hereunder shall be served upon the com-  
25 missioner or the secretary. All sums recovered against said com-  
26 mission under the foregoing provisions, together with any costs  
27 of suit and counsel fees, expenses and interest, shall be deemed  
28 expenses of care and maintenance of boulevards.

HOUSE . . . (1967) . . . No. 1417

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AN ACT TO FURTHER DEFINE THE LIABILITY OF THE COMMONWEALTH OF MASSACHUSETTS FOR INJURIES SUSTAINED FROM DEFECTS IN STATE HIGHWAYS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       Section 18 of chapter 81 of the General Laws, as amended, is  
2 hereby further amended by striking out the words constructed  
3 traveled roadway” appearing in the third line therein and in-  
4 serting in place thereof the words:—said highway,—and also  
5 by striking out the words or for injury sustained upon the side-  
6 walk of a state highway” as appearing in the seventh and eighth  
7 lines therein so that said section 18, as amended, will read as  
8 follows:—

9       *Section 18.* The commonwealth shall be liable for injuries  
10 sustained by persons while traveling on state highways, if  
11 the same are caused by defects within the limits of the said  
12 highway, in the manner and subject to the limitations, condi-  
13 tions and restrictions specified in sections fifteen, eighteen and  
14 nineteen of chapter eighty-four, except that the commonwealth  
15 shall not be liable for injury sustained because of the want of a  
16 railing in or upon any state highway, or during construction,  
17 reconstruction or repair of such highway. The amount which  
18 may be recovered for any such injury shall not exceed one fifth  
19 of one per cent of the valuation of the town in which the injury  
20 was received, nor shall it exceed four thousand dollars. Notice  
21 of the injury as required by law shall be given to a member of  
22 the department.

These bills seek to “remedy” or clarify an existing source of legal confusion and controversy in the field of claims arising from alleged defects in state highways or boulevards maintained by the Metropolitan District Commission. The legal problem is in some part demonstrated by a 1964 case of *Longo v. Metropolitan District Commission*, 348 Mass. 174. Mr. Longo said that while he was crossing the center island of the Revere Beach Parkway, he fell on a protruding iron rod. He said that this rod was a defect which was known to the commission and it could have been remedied. Mr. Longo was *walking across* the boulevard. The Supreme Judicial Court said:—

To recover, Longo must show that he was traveling on . . . (a) boulevard” and was injured by a defect *within the limits of the constructed traveled roadway*’ ”

House 1416 and 1417 of 1967 would eliminate the words “*constructed traveled roadway*” (among other things) and thus the commonwealth of Massachusetts and the Metropolitan District Commission would be liable for injuries which are sustained by



persons travelling on any “*state highway*” or “*boulevard*” of the M.D.C. In either case damages would be due to the claimant only if the injury was “caused by defects within the limits” of the highway or boulevard. The change is at this point since present law requires proof that the defect was “*within the limits of the constructed traveled roadway*”.

In the *Longo* case the Supreme Judicial Court said that there was no reason for restricting the scope of the liability of the Commonwealth in cases of this nature to people using the traveled roadway for *vehicular* traffic.

Pedestrians may be lawfully upon the traveled roadway of a State highway or boulevard, particularly at or near intersections. Places, like safety islands and cross-walks in the center of traffic circles or dividing strips, may be adapted to or intended for pedestrian use and may also be functional parts of the management of traffic upon the boulevard.

The language of (Chapter 92) s. 36 is broad enough to impose liability for injuries to pedestrians caused by defects in those portions of such safety and similar island or strips which are within the outer limits of the traveled part of the boulevard and reasonably adapted to pedestrian use.”

On the theory that the Legislature did not exclude such islands and strips from the liability area, and could have done so, the Supreme Judicial Court held that if the claimant shows by the evidence that he was injured at a point *where is was reasonable for a pedestrian to cross* the safety island, he may recover.

### Defects in Sidewalks

Thus under the existing statute claims are upheld which result from defects outside the area of the paved surface of the roadway.

It is the purpose of these two bills to amend Chapter 81 Section 18, and Chapter 92 Section 36 to permit recovery for injuries sustained by defects in the sidewalk of a state highway or boulevard. The Commonwealth has taken the position that it was not liable for such sidewalk defects. The suggested legislation would impose liability for actionable defects on the sidewalks of a state highway or boulevard as well as anywhere else within the limits of the highway or boulevard.

The Judicial Council does not recommend this legislation.

It has been demonstrated that the Supreme Judicial Court has permitted recovery in cases where the injured person was riding or walking where it was reasonable to expect travel on a state highway or boulevard. The remedy suggested would expand the liability area too far, possibly to the full extent of the lay-out of the highway or boulevard. There would be liability even in cases where the full area was not being used as a highway for travel or for purposes such as those indicated in the Longo case.

If the General Court wishes to extend the liability area to sidewalks, the burden of maintaining such sidewalks in a state of good repair should and does follow: And if this is the will of the General Court, the concept of the "traveled part of the highway" need not be overthrown.

It becomes difficult to state with certainty what definition should be used here but we are unwilling to abandon the present definition in favor of one which would give rise to claims arising from an unreasonable or unforeseeable use of the roads under the care of the Commonwealth. Whether to expand the liability area to include sidewalks which are designed and laid out for public use and travel is a matter for the exercise of the discretion of the General Court. We would be remiss in failing to advise that the Attorney General's office has urged legislative consideration of whether or not to extend liability to the sidewalks within the limits of the state highways and M.D.C. boulevards.

## VII. SPECIAL STUDIES

### Deceitful Competition

HOUSE . . . (1967) . . . No. 169

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#### APPENDIX E.

##### AN ACT ESTABLISHING THE UNIFORM DECEPTIVE TRADE PRACTICES ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       SECTION 1. Chapter 110 of the General Laws is hereby  
2       amended by inserting after section 29 thereof the following  
3       new sections:—

4       *Section 30.* In sections thirty through thirty-five of this  
5       chapter, unless the context otherwise requires:—

6       (a) article”, means a product as distinguished from its  
7       trademark, label, or distinctive dress in packaging;

8       (b) certification mark”, means a mark used in connection  
9       with the goods or services of a person other than the certifier  
10       to indicate geographic origin, material, mode of manufacture,  
11       quality, accuracy, or other characteristics of the goods or serv-  
12       ices or to indicate that the work or labor on the goods or services  
13       was performed by members of a union or other organization;

14       (c) collective mark”, means a mark used by members of  
15       a cooperative, association, or other collective group or or-  
16       ganization to identify goods or services and distinguish them  
17       from those of others, or to indicate membership in the col-  
18       lective group or organization;

19       (d) mark”, means a word, name, symbol, device, or any  
20       combination of the foregoing in any form or arrangement;

21       (e) person”, means an individual, corporation, govern-  
22       ment, or governmental subdivision or agency, business trust,  
23       estate, trust, partnership, unincorporated association, two or  
24       more of any of the foregoing having a joint or common in-  
25       terest, or any other legal or commercial entity;

26       (f) service mark”, means a mark used by a person to  
27       identify services and to distinguish them from the services of  
28       others;

29       (g) trademark” means a mark used by a person to identify  
30       goods and to distinguish them from the goods of others;

31       (h) tradename”, means a word, name, symbol, device, or  
32       any combination of the foregoing in any form or arrangement  
33       used by a person to identify his business, vocation, or occupa-  
34       tion and distinguish it from the business, vocation, or occupa-  
35       tion of others.

36        *Section 31.* (a) A person engages in a deceptive trade prac-  
37        tice when, in the course of his business, vocation, or occupa-  
38        tion, he:—

39        (1) passes off goods or services as those of another;

40        (2) causes likelihood of confusion or of misunderstanding as  
41        to the source, sponsorship, approval, or certification of goods  
42        or services;

43        (3) causes likelihood of confusion or of misunderstanding as  
44        to affiliation, connection, or association with, or certification  
45        by, another;

46        (4) uses deceptive representations or designations of geo-  
47        graphic origin in connection with goods or services;

48        (5) represents that goods or services have sponsorship, ap-  
49        proval, characteristics, ingredients, uses, benefits, or quanti-  
50        ties that they do not have or that a person has a sponsorship,  
51        approval, status, affiliation, or connection that he does not  
52        have;

53        (6) represents that goods are original or new if they are  
54        deteriorated, altered, reconditioned, reclaimed, used, or second-  
55        hand;

56        (7) represents that goods or services are of a particular  
57        standard, quality, or grade, or that goods are of a particular  
58        style or model, if they are of another;

59        (8) disparages the goods, services, or business of another  
60        by false or misleading representation of fact;

61        (9) advertises goods or services with intent not to sell them  
62        as advertised;

63        (10) advertises goods or services with intent not to supply  
64        reasonably expectable public demand, unless the advertisement  
65        discloses a limitation of quantity;

66        (11) makes false or misleading statements of fact concern-  
67        ing the reasons for, existence of, or amounts of price reduc-  
68        tions; or

69        (12) engages in any other conduct which similarly creates a  
70        likelihood of confusion or of misunderstanding.

71        (b) In order to prevail in an action under sections thirty  
72        through thirty-five of this chapter, a complainant need not  
73        prove competition between the parties of actual confusion or  
74        misunderstanding.

75        (c) This section does not affect unfair practices other-  
76        wise actionable at common law or under other statutes of this  
77        state.

78        *Section 32.* (a) A person likely to be damaged by a de-  
79        ceptive trade practice of another may be granted an injunc-  
80        tion against it under the principles of equity and on terms  
81        that the court considers reasonable. Proof of monetary dam-  
82        age, loss of profits, or intent to deceive is not required. Relief  
83        granted for the copying of an article shall be limited to the  
84        prevention of confusion or misunderstanding as to source.

85        (b) Costs shall be allowed to the prevailing party unless the



86 court otherwise directs. The court in its discretion may  
87 award reasonable attorneys' fees to the prevailing party if  
88 (1) the party complaining of a deceptive trade practice has  
89 brought an action which he knew to be groundless or (2) the  
90 party charged with a deceptive trade practice has willfully  
91 engaged in the trade practice knowing it to be deceptive.

92 (c) The relief provided in this section is in addition to  
93 remedies otherwise available against the same conduct under  
94 the common law or other statutes of this state.

95 *Section 33.* (a) Sections thirty through thirty-five of this  
96 chapter do not apply to:—

97 (1) conduct in compliance with the orders or rules of, or a  
98 statute administered by, a federal, state, or local govern-  
99 mental agency;

100 (2) publishers, broadcasters, printers, or other persons en-  
101 gaged in the dissemination of information or reproduction of  
102 printed or pictorial matter who publish, broadcast, or repro-  
103 duce material without knowledge of its deceptive character; or

104 (3) actions or appeals pending on the effective date of sec-  
105 tions thirty through thirty-five of this chapter.

106 (b) Subsections 31 (a) (2) and 31 (a) (3) of this chapter do  
107 not apply to the use of a service mark, trademark, certification  
108 mark, collective mark, trade name, or other trade identifica-  
109 tion that was used and not abandoned before the effective  
110 date of sections thirty through thirty-five of this chapter, if  
111 the use was in good faith and is otherwise lawful except for  
112 sections thirty through thirty-five of this chapter.

113 *Section 34.* Sections thirty through thirty-five of this chap-  
114 ter shall be construed to effectuate their general purpose to make  
115 uniform the law of those states which enact them.

116 *Section 35.* Sections thirty through thirty-five of this chap-  
117 ter may be cited as the Uniform Deceptive Trade Practices  
118 Act.

1 SECTION 2. If any provision of this act or the application  
2 thereof to any person or circumstance is held invalid, the in-  
3 validity does not affect other provisions or applications of the  
4 act which can be given effect without the invalid provision or  
5 application, and to this end the provisions of this act are sev-  
6 erable.

1 SECTION 3. This act takes effect January first, nineteen  
2 hundred and sixty-eight.

The aim of the National Conference of Commissioners on Uni-  
form State Laws is to provide protective legislation of a high  
quality so that in the highly mobile economy we have, there will  
be no advantage in attempting to take refuge in weak or imprac-

tical statutes. Much of this proposed statute is an affirmation of principles which are found in the decided cases of Massachusetts courts. It is not novel to find that "A person engages in a deceptive trade practice when in the course of his business, vocation or occupation he: (1) passes off goods or services as those of another or (2) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by another. A reading of the uniform act will demonstrate that all legitimate interests are protected.

Section 32 (a) of the proposed act provides that a person who is likely to be damaged by a deceptive trade practice of another may obtain an injunction for their protection. Innocent infringements are to be excused under Section 33.

We recommend the Uniform Deceptive Trade Practices Act as a clear statement of commercial morality. We point out that the relief provided in the suggested act is in addition to remedies otherwise available under the common law or under some other statute. Hence nothing is taken away from our law, and a useful tool is added.

When inferior or low quality goods are passed off on the public as being of first or accepted quality, the legal wrong is known generally as "deceptive trade practice." A mild example of this is when the famous beans of Boston are sold. The real Boston *Baked Bean* is *baked* not boiled, or simmered, fried or roasted. In the markets these days "Beans" are sold in cans which many presume are "Baked". They are boiled; and aside from giving Boston a bad name, they don't taste anywhere as good as Boston Baked Beans. Our pride alone should be sufficient to demand an end to this horrible state of affairs. We take this opportunity to urge lovers of Beans to unite; and we urge the General Court to resolve against this smirch on the fair name of our capitol city.

In a more serious vein, we wish to point out that while the Federal Trade Commission acts in those cases where interstate commerce is involved, actions by manufacturers and merchants injured by deceptive trade practices involve the enforcement of private rights, as well as the protection of the public interest. One who actually bakes his beans should have protection over one who markets beans, deceptively labeled as "baked" or la-

beled in such a way as to imitate the sterling product. Many of the lawsuits which involve deceptive trade practices are carried on in the Federal courts. As there is no "federal" common law, state law is applied in such cases. State law varies from place to place but the products are marketed everywhere — in states where there is good protection for the legitimate business and in states where such protection is all but lacking entirely.

The Uniform Act is intended to cover two main subjects:—

(a) Misleading labelling or identification, deceptive trade marks, etc.

(b) False or deceptive Advertising.

We recommend the proposed Uniform Deceptive Trade Practices Act beginning on p. 121.

## COMMENT ON THE 1967 STATUTE

### An Act Providing Protection for the Consumer Against Unfair Trade Practices

#### Chapter 813, Acts of 1967

The Deceptive Trade Practices Act is primarily a remedy for the businessman and secondarily it protects the public from being victimized by marginal operators and unscrupulous persons.

On December 26, 1967 the governor signed a bill (Senate No. 1409) providing for the *protection of the consumer*. This bill is complementary to the Deceptive Trade Practices Act and is by no means a substitute for it. The legislative purpose of Chapter 813 of the Acts of 1967 is found in Section 2(a) which declares:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

This new law is patterned on, and is to be interpreted in accordance with the regulatory experience and interpretations of the Federal Trade Commission (15 U.S.C.A. 45 (a) (1). The Federal Trade Commission is not engaged in the enforcement of private rights primarily, but is a regulatory agency protecting the public. Certainly a private businessman will complain to the F.T.C. but action of that agency is based on the fact that the public is being deceived. We do not see any difficulty whereby the new Chapter 93A limits the Uniform Deceptive Trade Practices Act.

Under the provisions of G.L. Chapter 266 Sections 91 and 91-B, there was some protection against untrue and misleading advertising. These existing statutes are criminal statutes which require a high degree of proof and the punishment on conviction is little more than a slap on the wrist. Protection of the public requires far more that is now given. The sanctions of Chapter 813 of 1967 include injunctive relief, fines, and loss of the franchise of any corporation which habitually violates the law.

We have taken pains to draw a distinction between these two legislative proposals because both appear to be useful and necessary for the protection of the legitimate business of our citizens and for the larger protection of the public.

The foisterer of *boiled* Boston Baked Beans can be dealt with under these legislative proposals because if the legitimate bakers of beans do not get him, the Attorney General, and his Consumer Protection Division, will do so under the new Chapter 93A.

AN ACT PROVIDING PROTECTION FOR THE CONSUMER AGAINST UNFAIR TRADE PRACTICES.

**CHAPTER 813, ACTS OF 1967**  
**(Senate (1967) No. 1409)**

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*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. The General Laws are hereby amended by inserting after chapter 93 the following chapter:—

CHAPTER 93A.

REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION.

*Section 1.* The following words, as used in this chapter unless the text otherwise requires or a different meaning is specifically required, shall mean:—

(a) Person" shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) Trade" and commerce" shall include the advertising, offering



for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

(c) Documentary material" shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording wherever situate.

*Section 2.* Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5 (a) (1) of the Federal Trade Commission Act (15U.S.C.45 (a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45 (a) (1) (The Federal Trade Commission Act) as from time to time amended.

*Section 3.* (1) Nothing in this chapter shall apply to (a) transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States; or

(b) trade or commerce of any person of whose gross revenue at least twenty per cent (20%) is derived from transactions in interstate commerce, excepting however transactions and actions which (i) occur primarily and substantially within the commonwealth, and (ii) as to which the Federal Trade Commission or its designated representative has failed to assert in writing within fourteen (14) days of notice to it and to said person by the attorney general its objection to action proposed by him and set forth in said notice; or

(c) transactions or actions of any person who shows that he has had served upon him by the Federal Trade Commission a complaint pursuant to 15 U.S.C. 45 (b) relating to said transactions or actions until the Federal Trade Commission has either dismissed said complaint, secured an assurance of voluntary compliance, or issued a cease and desist order relating to said complaint pursuant to 15 U.S.C. 45 (b).

(2) For purposes of (b) and (c) the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions.

*Section 4.* Whenever the attorney general has reason to believe that any person is using or is about to use any method, act or practice declared by section two of this chapter to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act or practice. At least ten (10)

days prior to commencement of any action under this section, the attorney general shall notify the person of his intended action, and give the person an opportunity to confer with the attorney general in person or by counsel or other representative as to the proposed action. Notice shall be given the person by mail, postage prepaid, sent to his usual place of business, or if he has no usual place of business, to his last known address. The action may be brought in the superior court of the county in which such person resides or has his principal place of business, or, with the consent of the parties, may be brought in the superior court of Suffolk county. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this chapter; provided, however, that no restraining order or injunction shall be issued except upon notice and an opportunity to be heard. Any district attorney or law enforcement officer reviewing notice of any alleged violation of this chapter, shall immediately forward written notice of the same with any other information that he may have to the office of the attorney general. Any person who violates the terms of an injunction issued under this section shall forfeit and pay to the commonwealth a civil penalty of not more than ten thousand dollars for each violation. For the purposes of this section, the court issuing such injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for recovery of such civil penalty.

*Section 5.* In any case where the attorney general has authority to institute an action or proceeding under section four of this chapter, in lieu thereof he may accept an assurance of discontinuance of any method, act or practice in violation of this chapter from any person alleged to be engaged or to have been engaged in such method, act or practice. Such assurance may include a stipulation for the voluntary payment by such person of the costs of investigation, or of an amount to be held in escrow pending the outcome of an action or as restitution to aggrieved buyers, or both. Any such assurance of discontinuance shall be in writing and be filed with the superior court of Suffolk county. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest.

*Section 6.* The attorney general, whenever he believes any person to be or to have been in violation of this chapter, may examine or cause to be examined for that purpose, any books, records, papers and memoranda of whatever nature relevant to such alleged violation. The attorney general may require the attendance of such person or of any other person having knowledge in the premises at any place in the county where such person resides or has a place of business or in Suffolk county if such person is a nonresident or has no place of business within the state, and may take testimony and require proof material for his information, and may administer oaths or take acknowledgment in respect of any book, record, paper or memorandum. The attorney general shall serve notice of the time, place and cause of such examination or attendance at least ten days prior to the date of such examination.

(a) Service of any such notice may be made by:

(1) Delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person;

(2) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(3) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principle place of business in this state or, if said person has no place or business in this state, to his principal office or place of business.

(b) Each such notice shall:

(1) State the time and place for taking the examination and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

(2) State the statute and section thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation;

(3) Describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded;

(4) Prescribe a return date within which the documentary material is to be produced; and

(5) Identify the members of the Attorney General's staff to whom such documentary material is to be made available for inspection and copying.

(c) No such notice shall:

(1) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or

(2) Require the disclosure of any documentary material which would be privileged, or which contains trade secret information, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the attorney general. Any book, record, paper, memorandum or other information produced by any person pursuant to this section shall not unless otherwise ordered by a court of this state for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same. This section shall not be applicable to any criminal prosecution brought under the laws of this state.

At any time prior to the date specified in the notice, or within twenty-one days after the notice has been served whichever period is shorter, the court may, upon motion for good cause shown, extended such reporting date or modify or set aside such demand. The motion may be filed in the superior court of the county in which the person

served resides or has his equal place of business, or in Suffolk county. This section shall not be applicable to any criminal proceeding nor shall information obtained under the authority of this section be admissible in evidence in any criminal prosecution for substantially identical transactions.

*Section 7.* A person upon whom a notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of this state. Any person who fails to appear, or with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this section, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject of any such notice, or knowingly conceals any relevant information, shall be fined not more than five thousand dollars.

Whenever any person fails to comply with any notice served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the attorney general may file, in the superior court of the county in which such person resides or has his principal place of business or of Suffolk county if such person is a nonresident or has no principal place of business in this state, and serve upon such person or in the same manner as provided in section six a petition for an order of such court for the enforcement of this section. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

*Section 8.* Upon petition by the general court may for habitual violation of injunctions issued pursuant to section 4 order the dissolution, or suspension or forfeiture of franchise of any corporation or the right of any foreign corporation to do business in the commonwealth whenever said corporation violates the terms of an injunction issued under section four of this chapter.

SECTION 2. This act shall be known and designated as the Regulation of Business Practice and Consumer Protection Act”.

## TAX LIENS ON PERSONAL PROPERTY

HOUSE . . . (1967) . . . No. 169

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### APPENDIX F

AN ACT ESTABLISHING THE REVISED UNIFORM FEDERAL TAX LIEN REGISTRATION ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*



1       SECTION 1. Section 39B of chapter 255 is hereby amended to  
2 read as follows:—

3       (1) Notices of liens upon personal property for taxes pay-  
4 able to the United States and certificates and notices affecting  
5 the liens shall be filed as follows:

6       (a) If the person against whose interest the tax lien applies  
7 is a corporation or a partnership, as these entities are defined in  
8 the internal revenue laws of the United States, in the office of  
9 the secretary of state;

10       (b) In all other cases in the office of the clerk of the city or  
11 town where the owner resides at the time of filing of the notice  
12 of lien.

13       (2) Certification by the secretary of the treasury of the  
14 United States or his delegate of notices of liens, certificates,  
15 notices of compromise or notices affecting tax liens entitles  
16 them to be filed and no other attestation, certification, or  
17 acknowledgement is necessary.

18       (3) If a notice of federal tax lien, notice of compromise, or a  
19 notice of revocation of any certificate described in Subsection (4)  
20 is presented to the filing officer.

21       (a) If he is the secretary of state, he shall cause the notice  
22 to be marked, held and indexed in accordance with the pro-  
23 visions of subsection (4) of section 9-403 of the Uniform Com-  
24 mercial Code as if the notice were a financing statement within  
25 the meaning of that Code.

26       (b) If he is the clerk of a city or town, he shall endorse thereon  
27 his identification and the date and time of receipt and forth-  
28 with file it alphabetically or enter it in an alphabetical index  
29 showing the name and address of the person named in the notice,  
30 the date and time of receipt, the serial number of the district  
31 director, and the total amount of tax, interest, penalties, and  
32 costs.

33       (4) If a certificate of release, non-attachment, discharge or  
34 subordination of any tax lien is presented to the secretary of  
35 state for filing he shall

36       (a) cause a certificate of release or non-attachment to be  
37 marked, held and indexed as if the certificate were a termina-  
38 tion statement within the meaning of the Uniform Commercial  
39 Code, except that the notice of lien to which the certificate re-  
40 lates shall not be removed from the files, and

41       (b) cause a certificate of discharge or subordination to be  
42 held, marked and indexed as if the certificate were a release of  
43 collateral within the meaning of the Uniform Commercial Code.

44       (5) If any of the certificates or notices referred to in sub-  
45 section (4) is presented for filing with the clerk of a city or town,  
46 he shall permanently attach the certificate to the notice of lien  
47 and shall enter the certificate or notice with the date of filing  
48 in any alphabetical federal tax lien index on the line where the  
49 notice of lien is entered.

50       (6) Upon request of any person, the filing officer shall issue

51 his certificate showing whether there is on file, on the date and  
52 hour stated therein, any presently effective notice of federal  
53 tax lien or certificate or notice affecting the lien, filed on or  
54 after January 1, 1968, naming a particular person, and if a notice  
55 or certificate is on file, giving the date and hour of its filing.  
56 The fee for a certificate is three dollars. Upon request the filing  
57 officer shall furnish a copy of any notice of federal tax lien or  
58 notice or certificate affecting a federal tax lien for a fee of one  
59 dollar and, if such statement consists of more than three pages,  
60 an additional fee of fifty cents for the fourth and each succeeding  
61 page.

62 (7) The fee for filing and indexing each notice of lien or cer-  
63 tificate or notice affecting the tax lien is:

64 (a) for a tax lien on personal property, three dollars;

65 (b) for a certificate of discharge or subordination, three dol-  
66 lars;

67 (c) for all other notices, including a certificate of release or  
68 non-attachment, one dollar.

69 The officer shall bill the district directors of internal revenue  
70 on a monthly basis for fees for documents filed by them.

1 SECTION 2. This act shall take effect January first, nineteen  
2 hundred and sixty-eight.

1 SECTION 3. Filing officers with whom notices of federal tax  
2 liens, certificates and notices affecting such liens have been  
3 filed on or before January first, nineteen hundred and sixty-  
4 eight, shall, after that date, continue to maintain a file labeled  
5 federal tax lien notices filed prior to January first, nineteen  
6 hundred and sixty-eight" containing notices and certificates  
7 filed in numerical order of receipt.

We recommend this bill.

It should be amended in Section 1 line 54 to read "January 1, 1969" and Section 2 and Section 3 should be similarly amended.

The bill deals solely and exclusively with United States Internal Revenue Liens on *personal* property.

The purpose of the bill is to state with precision how, where, and in what form notices of United States Tax Liens shall be filed. We are informed that if this legislation is enacted, the Internal Revenue Service will adopt the procedures which are set forth. In this way the interested parties can know for certainty whether or not a lien is in effect. This information is important in connection with all aspects of commerce and financing. Section (6) is of great value in that it provides that the filing officer is

obliged, upon the payment of a small fee, to furnish a statement of whether or not any liens are presently effective. This document would be similar to the Statement of Municipal Liens that is available from the city and town collectors of taxes. Unfortunately, the complexity of the Internal Revenue operation is such that it is almost impossible to learn whether or not any lien is outstanding unless there is a search of the public records. In cases involving liens and notices of liens against real estate, the Internal Revenue files such notices at the proper registry of deeds.

Unless there has been some change in thinking on the part of the Internal Revenue Service, we would assume that such legislation is desirable and necessary.

## RESPONSIBILITY IN CONSTRUCTION CONTRACTS

# HOUSE . . . (1967) . . . No. 2201

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AN ACT TO INVALIDATE CERTAIN REQUIREMENTS FOR INDEMNITY IN THE CONSTRUCTION INDUSTRY.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 149 of the General Laws is hereby amended by insert-
- 2 ing the following section after section 29A:—
- 3 *Section 29B.* A covenant, promise, agreement or understand-
- 4 ing in, or in connection with or collateral to, a contract or agree-
- 5 ment relative to the construction, alteration, repair or main-
- 6 tenance of a building, structure, appurtenance and appliance,
- 7 including moving, demolition and excavating connected there-
- 8 with, purporting to indemnify the promisee, an architect, engi-
- 9 neer, surveyor or any other person against liability for damages
- 10 arising out of bodily injury to persons or damage to property
- 11 caused by or resulting from the negligence of the promisee or
- 12 indemnitee, his agents or employees, or from defects in the maps,
- 13 plans, designs and specifications used by such architect, engineer,
- 14 surveyor or their agents or employees is against public policy
- 15 and is void and unenforceable.

This bill seems to have been filed by a member of the General Court on the petition of the Associated Subcontractors of

Massachusetts and to result from a revision in the standard contract forms published by the American Institute of Architects (A.I.A.). In the 10th edition of the "General Conditions of the Contract for Construction — AIA Document A 201 copyrighted September 1966" and revised January 1967 a new "INDEMNIFICATION" section appears for the first time. This section reads as follows:—

#### 4.18 INDEMNIFICATION

4.18.1 The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

4.18.2 In any and all claims against the Owner or the Architect or any of their agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph 4.18 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

4.18.3 The obligations of the Contractor under this Paragraph 4.18 shall not extend to the liability of the Architect, his agents or employees arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, his agents or employees provided such giving or failure to give is the primary cause of the injury or damage."

When this section was added, General Contractors around the nation were opposed to it and were determined not to bid on contracts in which this clause appeared. This feeling was prevalent in the Boston area in the summer of 1967 to such an extent that bonding companies requested the use of earlier editions of the A.I.A. contract form in some instances.

To meet the vehement opposition of the General Contractors, the A.I.A. introduced Section 4.18.3 in January of 1967. Under this, the most recent addition, the General Contractor specifically



rejected any liability which was properly that of the Architect. This revision was satisfactory to the Associated General Contractors.

### **An Insured Risk**

The indemnification provision in the recent A.I.A. contract revision is covered by insurance which is available to the General Contractor at no great additional cost.

In September of 1967 a still more recent revision of A.I.A. Form A 201 was printed and this most recent revision was approved by the Association of General Contractors which includes the largest firms in the nation.

Sub-contractors, and the Associated Sub-contractors of Massachusetts, did not play a direct role in the negotiations over the new A.I.A. form. One should have in mind that the indemnification responsibility runs from the General Contractor to the Owner under the new A.I.A. agreement.

There is no legal requirement that the A.I.A. form *must* be used but we think it unreasonable to assume that the A.I.A. documents would not be used on a majority of the substantial construction projects in process or planned for the foreseeable future.

### **Legal Effect of House (1967) 2201**

The proposed bill would declare, we think, that the new A.I.A. contract provision, Section 4.18, in Document A 201 would be against public policy and would be void and unenforceable.

In Maine and in New Mexico this legislative proposal has been turned down.

We do not believe that the A.I.A. contract provision is against public policy. The purpose here is to protect the owner and to some extent the architect (who acts as agent of the Owner during construction) from tort claims which are based on alleged negligence on the part of the general contractor, one of the sub-contractors, or the supplier of materials, equipment and the like. We have pointed out that the bill is not necessarily a shelter for the Architects since they remain liable for negligent design,

or for failure to give the proper instructions and directions to the general contractor. If such negligence is the *primary cause* of injury, the general contractor is relieved of responsibility and the architect or the owner is saddled with it.

By the nature of things, it is expected that the general contractor and his staff will possess a certain amount of skill and experience. It is not expected that the architect will be required to point to the place where every nail is to be driven or every rivet put in place. For this reason the General Contractor is still liable for negligence which can be shown to come about in whole or in part by reason of a negligent act or omission of the General Contractor.

We can not stress too much that this entire risk is insurable. It is not against public policy for businessmen to decide how to allocate the cost of insurance premiums on a construction project.

We might also point out that under Section 10.1.1 of the A.I.A. contract:—

“10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions, and programs in connection with the work.”

Elsewhere in Article 10 (entitled “Protection of Persons and Property”) it is the General Contractor who is made responsible except in cases where the damage or loss is attributable to faulty Drawings or Specifications or to the acts or omissions of the Owner or Architect or their agents and employees. And we find in Article 11 “Insurance” that the general contractor is required to furnish the liability insurance called for under paragraph 4.18 “Indemnification” which is set forth above.

We do not find that there is any sound reason for the enactment of House (1967) 2201. We can say that it would interfere seriously with what seems to be a sensible and practical method of dealing with the problem.

Large construction projects are financed with tax money collected from the people of the Commonwealth. Viewed from that aspect, the A.I.A. contract form is far more desirable for the protection of the greater number of “Owners” who make the project possible and for whom protection is assured.

## STOP PAYMENT ORDERS

## HOUSE . . . (1967) . . . No. 228

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AN ACT AFFECTING THE RELATIONSHIP BETWEEN A BANK AND A DEPOSITOR WHEN  
THE BANK HAS NOTICE OF A STOP PAYMENT ON A CHECK.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Section 4-403 of chapter 106 of the General Laws is hereby
- 2 amended by striking out the third paragraph.

Chapter 106 of the General Laws is the Commercial Code, based on the "Uniform Commercial Code" which has been enacted by a number of states.

The proposal calls for the striking out of the following paragraph:—

"The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer."

By eliminating this paragraph from Sec. 4-403 (3) it would appear that the burden of proof would shift from the customer to the bank. At present, if a customer tells the bank to stop payment, he must prove that he gave the stop payment order, and he must also prove that he suffered a loss and the amount thereof. There is little difficulty in understanding the necessity for proof that such an order was in fact given. A bank customer should not be in a position to hold the bank responsible for something done in the usual course of business without notice.

The second element of the present statute is the requirement that the customer establish that there was a loss, and the amount thereof, if a stop payment order was disregarded. Hence, if the customer owed \$335.00 for his automobile insurance premiums, and after he sent the check, a stop payment order was disregarded, he might be in difficulty in showing a loss of \$335.00, or in any sum, since he actually owed this sum to the person who got the check. His reasons for stopping payment might have nothing to do with the legitimacy of the debt, but this would not be the normal case.

We are advised that this bill is opposed by the banking industry and by the Commissioners on Uniform State Laws. It seems that the impetus for the elimination of the customer's burden of proof is due to over-zealousness on the part of *one* suburban Boston bank.

The free flow of checks is of paramount economic importance.

The necessity for stop-payment orders is also of importance. In a recent municipal scandal in New York City, the City of New York was able to stop payment on a check for a huge sum only minutes before it was presented for payment.

We prefer not to recommend a change in the statute on the basis of the ill-advised attitude of one bank on one occasion. If there was strong evidence of abusive treatment of bank customers, (and we have no such evidence) it might be advisable for the General Court to take action. Failing to find that situation, we do not recommend any action in the matter at this time.



## GENERAL RULES

### APPENDIX "A"

#### 3:16. JUDICIAL CONFERENCE

G. L. c. 211, §§ 3, 3A-3F, as inserted by St. 1956, c. 707, §§ 1, 2, as amended.

(1) The Massachusetts Judicial Conference is hereby constituted to consist of the following: (a) the Chief Justice (who shall serve as chairman of the Conference) and the Associate Justices of this court; (b) the Chief Justice of the Superior Court; (c) the Chief Judge of the Probate Courts; (d) the Judge of the Land Court; (e) the Chief Justice of the Municipal Court of the City of Boston; (f) the Chief Justice of the District Courts; (g) the Chairman of the Judicial Council; and (h) the Executive Secretary of this court, who shall act as secretary, and as the principal administrative officer of the Conference.

(2) The judges and officers mentioned in paragraph (1) shall serve as the members of the Conference until further order of this court. Any member may designate another member of the court or body which he represents to act for him at any meeting.

(3) The Conference may invite other judges and members of the bar (a) to participate in any one or more projects, studies, meetings, or other activities, or (b) to prepare and present studies, recommendations, and comments upon matters concerning which the Conference desires information.

(4) The Conference (a) may consider and make recommendations on matters relating to the conduct of judicial business, the improvement of the judicial system, and the administration of justice in such manner as the Conference from time to time may deem appropriate; (b) may initiate and conduct legal research; (c) shall assist this court in coordinating the activities of the several courts; (d) may conduct general conferences and educational meetings; (e) may appoint reporters, advisers, research assistants, and other employees, either for the general work of the Conference or for designated projects and, subject to the availability of necessary funds, may make expenditures, including the payment of the foregoing persons; (f) may employ such facilities of universities, law schools, colleges, bar associations, foundations, and other institutions, as may be made available to it; and (g) may appoint standing or special committees. The Chief Justice of this court may appoint a vice-chairman of the Conference and may delegate to him duties with respect to the Conference.

(5) The Conference shall meet at such times as may be designated by the Chief Justice or a majority of the Justices of this court.

## DRAFT ACTS RECOMMENDED TO THE 1968 GENERAL COURT

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**CIVIL JURY TRIALS IN  
CERTAIN DISTRICT COURTS  
For Comment See Page 21**

**1968 DRAFT ACT**

AN ACT PROVIDING FOR THE TRIAL OF CIVIL ACTIONS ENTERED IN DISTRICT COURTS  
IN CERTAIN COUNTIES BY JURIES OF SIX IN CERTAIN DISTRICT COURTS.

*Be it enacted by the Senate and House of Representatives in General Court  
assembled, and by the authority of the same, as follows:*

SECTION 1. After the entry of a civil action in any district court in the county of Berkshire, Bristol, Essex, Hampden, Middlesex, Norfolk, Plymouth or Worcester, any party may, within the time provided or allowed for the filing of an answer, claim a trial by a jury of six in the district court of central Berkshire, the third district court of Bristol, the first district court of Essex, the district court of Springfield, the third district court of eastern Middlesex, the district court of northern Norfolk, the district court of Brockton or the central district court of Worcester, respectively. Trials by such juries in said district courts shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that each party shall be entitled to two peremptory challenges. Jurors shall be drawn from the pool of jurors available for the jury sessions in civil cases in the superior court for the respective counties. The chief justice of the district courts shall arrange for the jury sessions in said district courts, shall assign justices and special justices thereto, and shall arrange for the appointment of such temporary assistant clerks and temporary court officers as may be necessary, who shall serve for the duration of the session.

Trials by such juries of six in said district courts shall be held in the respective courthouses of said district courts, or if not practicable there, then in such courthouses as may be designated from time to time by the Chief Justice of the district courts.

Review of such trials may be had directly by the supreme judicial court by a bill of exception, appeal or report in the same manner provided in the case of trials by jury in the superior court.

If any party claims a trial by a jury of six, any other party shall have seven days in which to refuse to agree to such trial by filing a written refusal with the clerk, and the party claiming such trial by a jury of six may, within six days thereafter remove the case for trial before the superior court with

36 or without a jury. If any party refuses to agree to a trial by  
37 a jury of six, and if the case is not removed to the superior  
38 court under the provisions of this section or section one hun-  
39 dred and four of chapter two hundred and thirty-one of the  
40 General Laws, the trial shall be in the district court without  
41 jury.

1 SECTION 2. Section one A of chapter seven hundred and  
2 thirty-eight of the acts of nineteen hundred and fifty-six, as  
3 most recently amended by section one of chapter six hun-  
4 dred and eighteen of the acts of nineteen hundred and fifty-  
5 seven, is hereby repealed.

1 SECTION 3. The provisions of sections one and two of this  
2 act shall take effect on October first, nineteen hundred and  
3 sixty-eight and apply to civil actions entered on or after said  
4 date, and shall become inoperative and cease to apply to  
5 such actions entered on and after October first, nineteen hun-  
6 dred and seventy-one.













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# **FORTY-FOURTH REPORT**

## **Judicial Council of Massachusetts**

### **— 1968 —**

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**The New Long Arm Statute, Chapter 223A.  
Consumer Claims Courts**

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CS.  
LL.





**FORTY-FOURTH REPORT**  
**Judicial Council of Massachusetts**  
**— 1968 —**

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## **The Commonwealth of Massachusetts**

### **JUDICIAL COUNCIL**

DECEMBER 1968

TO HIS EXCELLENCY, JOHN A. VOLPE,  
*Governor of Massachusetts*

In accordance with the provisions of  
Section 34B of chapter 221 of the General  
Laws (Ter. Ed.), we have the honor to  
transmit the forty fourth annual report of the  
Judicial Council for the year 1968.

REUBEN L. LURIE  
JOHN A. COSTELLO  
ELWOOD H. HETTRICK  
ELIJAH ADLOW  
ARTHUR A. THOMSON  
CHARLES W. BARTLETT  
LIVINGSTON HALL

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**JUDICIAL COUNCIL****G. L. (Ter. Ed.) Chapter 221, §§34A-34C**

The Judicial Council Was Established To Make A Continuous Study of The Organization, Procedure and Practice Of The Courts.

The Council Makes Reports Requested By the Legislature, and Suggests Improvements in the Administration of Justice.

**Statutory Authority**

*Section 34A.* There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods not exceeding four years, as he shall determine.

*Section 34B.* The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

*Section 34C.* No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof shall receive from the commonwealth a salary of five thousand dollars.

**Recommendations for Improving the Effectiveness of the Judicial Council Appear in this Report at Page 21 to 25.**

## MEMBERS OF THE JUDICIAL COUNCIL (DECEMBER, 1967)

FREDERIC J. MULDOON of Westwood, *Chairman*<sup>1</sup>

REUBEN L. LURIE of Brookline  
JOHN A. COSTELLO of Andover  
ELWOOD H. HETTRICK of Weston  
ELIJAH ADLOW of Boston

LIVINGSTON HALL of Concord  
RAYMOND F. BARRETT of Milton<sup>2</sup>  
ARTHUR A. THOMSON of North Andover  
CHARLES W. BARTLETT of Dedham

<sup>1</sup> MR. FREDERIC J. MULDOON died on July 4, 1968.

<sup>2</sup> MR RAYMOND F. BARRETT died on September 11, 1968.

JAMES B. MULDOON of Weston, *Secretary*  
One Court Street, Boston, Massachusetts 02108

### INQUIRIES CONCERNING THIS REPORT

This report is distributed by the Public Document Room at the State House in Boston. Copies are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others. As long as the supply lasts, copies of this report, and also copies of some earlier reports, can be obtained, without charge, by requesting them from the Public Document Room, State House, Boston. Massachusetts.

Correspondence may be sent to James B. Muldoon, Secretary, Judicial Council of Massachusetts, One Court Street, Boston, Mass. 02108.

### CHANGES IN MEMBERSHIP OF THE COUNCIL IN 1968

Frederic J. Muldoon, Esq., a Boston attorney for 54 years, who served as a member of the Council since 1937, as its Vice Chairman from 1952 to 1958, and as its Chairman since 1958,



died during the year. The Commonwealth thus lost a fine public servant, who had also been an *ex officio* member of the Judicial Conference of Massachusetts. His wise judgment, unflagging interest in the work of the Council, and impartial manner as its Chairman during his ten years of service in that position endeared him to all of his colleagues.

Raymond F. Barrett, Esq., a Norfolk County attorney and former President of the Massachusetts Bar Association, who served as a member of the Council since 1959, also died during the year. A busy trial lawyer, member of the House of Delegates of the American Bar Association and Fellow of the American College of Trial Lawyers, he brought to the work of the council an informed and practical sense of the law which was respected by all of his colleagues.

### NEW MEMBERS OF THE COUNCIL

Paul A. Tamburello, Esq., of Pittsfield, and Paul T. Smith, Esq., of Boston, were appointed by Governor Volpe to fill these vacancies so late in the year that they were unable to participate in the deliberations and decisions of the Council on the matters embodied in this its Forty-fourth Report.

# I. THE COURTS

## THE "LONG ARM" STATUTE OF 1968

The "Long Arm" statute which we recommended in our 42nd Report was approved by the governor on July 25, 1968. This statute will allow Massachusetts residents to require those from afar to litigate certain contested matters in the Massachusetts courts. The enlargement of the jurisdiction of our courts, and the instances in which the "Long Arm" statute applies require reference to the first six sections of the new Chapter 223A.

CHAP. 760. AN ACT EXTENDING JURISDICTION OF COURTS OF THE COMMONWEALTH TO CERTAIN PERSONS IN OTHER STATES AND COUNTRIES.

*Be it enacted, etc., as follows:*

The General Laws are hereby amended by inserting after chapter 223 the following chapter:—

### CHAPTER 223A.

#### JURISDICTION OF COURTS OF THE COMMONWEALTH OVER PERSONS IN OTHER STATES AND COUNTRIES.

*Section 1.* As used in this chapter "person" includes an individual, his executor, administrator or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this commonwealth and whether or not organized under the laws of this commonwealth.

*Section 2.* A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this commonwealth as to any cause of action.

*Section 3.* A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

- (a) transacting any business in this commonwealth;
- (b) contracting to supply services or things in this commonwealth;
- (c) causing tortious injury by an act or omission in this commonwealth;
- (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;
- (e) having an interest in, using or possessing real property in this commonwealth; or

(f) contracting to insure any person, property or risk located within this commonwealth at the time of contracting.

*Section 4.* When the exercise of personal jurisdiction is authorized by this chapter, service may be made outside this commonwealth.

*Section 5.* When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

The new act provides that service of legal process outside this Commonwealth, as now authorized in "Long Arm" cases, may be made by various methods reasonably calculated to give actual notice to the defendant. There is also provision for taking depositions in other places for use in the courts of this Commonwealth, and for other discovery proceedings.

Traditional concepts about doing business, and other rigid jurisdictional requirements of the past are no longer controlling. We anticipate that our courts will find it useful to examine decisions from New York and from other jurisdictions where the "Long Arm" statute is in effect as possible guidelines in the application of this new statute.

## CONSUMER CLAIM SESSIONS IN DISTRICT COURTS

# SENATE . . . (1968) . . . No. 374

### AN ACT PROVIDING FOR THE ESTABLISHMENT OF A CONSUMER COURT SECTION WITHIN THE DISTRICT COURTS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       SECTION 1. Chapter 218 of the General Laws, is hereby  
2       amended by striking out Section 21 as most recently amended  
3       by Chapter 21 of the Acts of 1967, and inserting in place  
4       thereof the following section:—

5       *Section 21.* The chief justice of the district courts shall make  
6       uniform rules applicable to all the district courts except the  
7       municipal court of the city of Boston, and the chief justice of  
8       the municipal court of the city of Boston shall make rules for  
9       said court, providing for a simple, informal and inexpensive

10 procedure, hereinafter called the procedure, for the determina-  
11 tion, according to the rules of substantive law, of claims in the  
12 nature of contract or tort, other than slander and libel, in which  
13 the plaintiff does not claim as debt or damages more than two  
14 hundred dollars or any claim where the cause of action is  
15 based on any transaction entered into by a plaintiff for his  
16 own personal, family or household purposes in which the  
17 plaintiff does not claim as debt or damage more than one  
18 thousand dollars, and for a review of judgments upon such  
19 claims when justice so requires. The procedure shall not be  
20 exclusive, but shall be alternative to the formal procedure for  
21 causes begun by writ. Actions under this section and sections  
22 twenty-two to twenty-five, inclusive, shall be brought in the  
23 judicial district where the defendant lives or has his usual  
24 place of business.

1 SECTION 2. Said Chapter 218, is hereby further amended by  
2 inserting after section 21, the following section:—

3 *Section 21A.* In all causes of action under Section 21, where  
4 the claim for debt or damages is more than two hundred dol-  
5 lars, the court may at its discretion award to the prevailing  
6 party reasonable cost including attorneys fees as part of the  
7 award for debt or damage.

1 SECTION 3. This act shall take effect on July first, nineteen  
2 hundred and sixty-nine.

Those who suggest this legislation are sincerely concerned with the difficulty of obtaining redress, speedily and economically, in cases where those with modest and low incomes have purchased consumer goods which prove defective, shoddy, insubstantial, and inappropriate for the purpose for which such goods were intended.

The procedure suggested is an extension of the small claims court where cases involving less than \$200.00 are disposed of expeditiously (and sometimes rather summarily) without the necessity for formal procedure or attorneys.

The “Consumer Court Section” would be conducted in much the same manner, and the courts would make rules for a “simple, informal, and inexpensive procedure.”

Laws for the protection of the “Consumer” are anything but new. In 1667 the General Court enacted a statute which provided a penalty of Five Pounds for selling inferior Beer, Ale, or other “Drink.” One half of the fine went to the informer. Pre-



sumably the "Informer" was the disappointed customer. This was a criminal statute, however primitive.

To increase the jurisdictional limit of the District Courts and the Boston Municipal Court from \$200.00 to \$1,000.00 in a limited number of cases would not be a wise move.

We can not forget that the accused seller has certain rights among them the right to trial by jury if he shall so elect. In addition, a transaction which involves as much as \$1,000 should surely entitle the seller to be represented by counsel of his own choice. We can hardly accept a proposition that the customer is *always* right.

With the introduction of government sponsored law offices which furnish lower income groups with free legal advice and representation, we fail to see why the normal lower court procedures can not be used.

There is no special brand of law peculiarly applicable to "Consumers." Should they not receive what they had bargained for, possibly they should bring an action in contract to obtain that for which the consideration was paid. Should there be misrepresentation or deception, a suit for deceit, fraud, or even a criminal complaint may be the solution.

Under Chapter 110 of the General Laws, we now have the Uniform Deceptive Trade Practices Act, and under Chapter 93A we have a Consumer Protection Act which provides a remedy for Unfair Trade Practices.

In our opinion the proposal for a special kind of "simple, informal, and inexpensive procedure" in consumer cases involving as much as \$1000.00, and providing that the seller would pay counsel fees if he lost his case, is not equal justice under law, nor is it practical, nor would it be consistent with the Seventh Amendment of the United States Constitution and the Fifteenth Article of the Massachusetts Declaration of Rights in our own Constitution.

We might observe that the honest merchant does not have a "simple informal, and inexpensive procedure" to collect satisfaction for torts visited upon him by his customers, or for breaches of valid contracts.

The courts, and their judges, Choate once said, "shall know nothing about the parties; everything about the case." The same

justice should be available for all. In the case of those groups who have been victimized by unfair and unprincipled merchants, we are mindful that the opportunity for them to obtain justice has been immeasurably improved by recent legislation and free legal service. Social progress of this nature, and the enactment of laws which the courts can apply for consumers' protection seem to make this legislation inappropriate and we do not recommend it.

## YOUTHFUL OFFENDERS

# HOUSE . . . (1968) . . . No. 4925

---

### AN ACT PROVIDING FOR THE SPECIAL ADJUDICATION OF YOUTHFUL OFFENDERS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. The General Laws are hereby amended by  
2           inserting after chapter 120 the following chapter:—

3   CHAPTER 120A.

4   YOUTHFUL OFFENDERS.

5           *Section 1.* For the purpose of this chapter the term "youth"  
6           shall mean a minor who has reached the age of seventeen years  
7           or over but has not reached the age of twenty-one years;  
8           and the term "youthful offender" shall mean a youth who has  
9           committed a crime not punishable by death or life imprison-  
10          ment, who has not previously been convicted of a felony, and  
11          who is adjudged a youthful offender pursuant to the provi-  
12          sions of the following sections.

13          *Section 2. (a)* In any criminal proceedings or on indict-  
14          ment or complaint against a youth for any offense against  
15          the law of the commonwealth or for a violation of any city  
16          ordinance or town by-law, the court having jurisdiction of  
17          the offense or violation if convinced beyond a reasonable  
18          doubt of the guilt of the defendant and after a finding or  
19          verdict of guilt may, before imposing sentence in such case,  
20          conduct a hearing to determine whether such person is, a fit  
21          subject to be adjudicated and treated as a youthful offender.

(b) If at the conclusion of the hearing provided by clause (a) or of any adjournment thereof, the court shall be of the opinion that the youth is not a fit subject for adjudication and treatment as a youthful offender, the court shall impose a sentence or make such other disposition as is provided by law for such offense or violation.

(c) If at the conclusion of the hearing provided by clause (a) or of any adjournment thereof, the court shall be of opinion that the person is a fit subject for adjudication and treatment as a youthful offender, the court shall adjudicate him as a youthful offender. The defendant before or after the hearing provided by clause (a) may refuse to be adjudged a youthful offender and elect to be sentenced under the original complaint or indictment.

(d) The determination and finding by a court that a person is not a fit subject for adjudication and treatment as a youthful offender shall be a matter for its sole discretion.

*Section 3.* If the defendant enters a plea of guilty to the charge of being a youthful offender or if, after trial, the court shall find that he committed the acts charged against him in the indictment or complaint, the court may adjudge the defendant to be a youthful offender and this, if accepted by the defendant, shall be a final disposition of the indictment or complaint.

*Section 4.* Pending and during the investigation, trial, adjudication or acquittal of the defendant, or any other proceedings hereunder, the court shall have the same powers over the person of the defendant as it would have in the case of an adult charged with crime.

*Section 5.* The court upon the adjudication of any person as a youthful offender, under this chapter may (1) fine, as provided by law for the offense initially charged, (2) commit the youth to Massachusetts Correction Institution, Concord, or to such other facility of the department of correction as may be developed by the department specifically for the training and rehabilitation of youthful offenders; youthful offenders so committed to Massachusetts Correctional Institution, Concord, shall be eligible for parole and supervision by parole board in accord with provisions applicable to adult offenders, (3) impose sentence and suspend its execution, or (4) place him on probation for any term not to exceed his twenty-first birthday; provided, however, that the court in its discretion may from time to time, while such probation is in force, extend such probation not to exceed his twenty-second birthday. From any sentence of commitment imposed under this section by a district court judge on a person adjudged a youthful offender, said youthful offender shall have the right to appeal to the superior court. In no event shall such sentence be in excess of that provided for in original complaint or indictment. Commitment

hereunder shall be for a period not to exceed his twenty-first birthday except that when adjudication made is subsequent to youth's twentieth birthday, commitment may run to his twenty-second birthday.

*Section 6.* If a youth who has been placed in care of a probation officer is alleged to have violated his probation, said officer, at any time before the final disposition of the case, may arrest such youth without a warrant and take him before the court, or the court may issue a warrant for his arrest. When such youth is before the court, it may make any disposition of the case which it might have made before said youth was placed on probation, or may continue or extend the period of probation.

*Section 7. (a)* Records in cases brought against any youth under this chapter shall not be admissible in evidence or used in any way in any court proceedings, except in imposing sentence in any subsequent criminal proceedings against the same person; and except for adjudications which parallel those set forth under section fifty-eight B of chapter one hundred and nineteen, nor shall such adjudication or disposition or evidence operate to disqualify a youthful offender in any future examination, appointment, or application for public service under the government either of the commonwealth or of any political subdivision thereof.

*(b)* The records of any youth adjudicated a youthful offender, including fingerprints, photographs and physical descriptions shall not be open to public inspection. But, such records as required under section ninety-nine and section one hundred of chapter two hundred and seventy-six, shall be submitted to the commissioner of probation. Such records shall be retained as confidential matter and kept in the same manner as juvenile offenders. The court in its discretion, in any case, may permit an inspection of any of its papers or records.

*Section 8.* The age of the youthful offender at the time of the commission of the crime alleged shall determine whether he is eligible to the benefits herein provided.

SECTION 2. Section 33 of chapter 279 of the General Laws, as most recently amended by section 12 of chapter 308 of the acts of 1964, is hereby further amended by adding the following sentence:—If sentenced to said reformatory as a youthful offender he may be held therein for a period not to exceed his twenty-first birthday except when sentence is subsequent to his twentieth birthday, he may be held for a period not beyond his twenty-second birthday.

Speaking at the meeting of the National Institute of Crime and Delinquency at Swampscott on June 1, 1959, Judge Frank



J. Murray (then of our Superior Court, now a Judge of the U.S. District Court in Boston) said that "the traditional and historic role of the court is that of a disciplinary agency — not a social agency." Judge Murray spoke in reference to the proposals then being made for an experimental procedure in dealing with Youthful Offenders between 17 and 22. Among other things, Murray said this:—

"At the outset of such new procedure the court is required to determine whether the offender 'might derive benefit from special youthful offender treatment' or 'will not derive benefit from the application of special youthful offender treatment'. The treatment referred to is defined as corrective and preventive guidance and training designed to protect the public by correcting social behaviour of youthful offenders".

In the legislation which was then being proposed as the result of a lengthy study (House No. 2790, Jan. 1959) by a special legislative commission, a special Youth Correction Authority was recommended, and it was further provided that before any determination was made that the individual should be designated as a youthful offender, there would be a mental and physical examination to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, previous delinquency or criminal experience and other factors contributing to his delinquency.

Under the legislation now proposed, the only test for a youthful offender is that he be between 17 and 21, and a first felony offender.

The legislation does not call for any investigation of his mental and physical condition, or any other circumstances concerning him. With the present resources available to the probation department of the various courts, which is inadequate, it is difficult to see how such investigations could be carried out without both adequate funds and statutory authority.

The only possible merit that can be claimed for the proposed legislation is that it would prevent a person between 17 and 21 from getting a criminal record for a first felony offense if the court decided that he should receive "Youthful Offender" treatment.

We can find nothing in the proposed legislation which would be of any benefit to the youthful offender with the exception of the provisions of Section 7 dealing with records of such persons

and their later use against the interests of the individual.

By what standards is the court to decide whether or not a person is a Youthful Offender?

What special treatment will such a person be given if he is sent to Concord?

Is the Youth Service Board not now so over-loaded, undermanned, and beset with budget restrictions that it can not take on added "Youthful Offenders" for special handling?

A "Youthful Offender" procedure has been in effect in New York for several years. It can be used with offenders between 16 and 19 who have no prior felony conviction. The adjudication has been held to be a "*privilege*" and not a right. Some form of "Youthful Offender" act has been on the statute books in New York since 1944 and we note that in *Zivin vs. District Court of Nassau*, 186 N.Y.S. 2d 110 (1959) the defendant argued with success that the failure to treat him as a "Youthful Offender", merely because the probation department did not have the money or facilities to properly handle the necessary investigation and testing, was legal error.

Some doubt has been cast upon the "Youthful Offender" idea in recent years by those who contend that the defendant should not be forced to give up his right to a jury trial in order to be treated as a "Youthful Offender." Others criticize the plan on the basis that the trial given to the "Youthful Offender" is not the same type of trial that is given to others who do not qualify for such treatment. It is suggested that the determination of guilt in at least some "Youthful Offender" cases is not arrived at by "the regular judicial process with an actual and fair trial and all the rules of evidence lived up to."

As we have noted, this recommendation is not new. The 1958 legislation contained in Appendix "A" of House No. 2790 of 1958 was very similar to the procedure used in New York. In the annual report of the Advisory Committee on Service to Youth in 1966 (House No. 4637 of 1966) the 1958 proposal was not pressed and the "Youthful Offender" label, and all that it implies, was to be what appears to be an alternative disposition in certain cases involving young people. The real purpose is

to allow the court to wipe away the criminal record of a person between 17 and 21 who has erred only once.

We are not wholly convinced that the purpose of the most recent "Youthful Offender" legislation can be achieved under existing conditions and under the existing financial limitations involved in the making of a pre-sentencing investigation, if such an investigation is intended, as under the New York idea. If no investigation is to be made, the provisions for a "hearing" are deceptive.

It is our judgment that the trial of those who are not juveniles should continue to be held in our District and Superior criminal sessions, with or without a jury, as the defendant may have a right to choose. This, in any event, will avoid constitutional problems, and claims of unfair treatment.

Were we to be convinced that the courts are now powerless to deal with young first offenders in a reasonable and human fashion, in appropriate cases, we might give further consideration to the most recent limited proposal which seems only to benefit a limited age group without reference to emotional maturity and other circumstances and without providing any real pre-sentencing investigation or testing to make the determination realistic.

We are told that many who find that a child in trouble can not be treated as a juvenile become angered at the situation. A boy of 18 who commits a crime in the company of a boy of 16 may be treated as an adult felon while the 16 year old is treated as a juvenile with no record. The offender at 22, under the proposed statute, would not be a "Youthful Offender" as would one at 21 years of age.

We refuse to support any attempt to solve the dilemma presented here merely on what we think is an alternative disposition of the case based mainly on chronological age.

### DISSENT OF LIVINGSTON HALL

I believe that the proposed Youthful Offender Act should be adopted. It would call attention to meaningful treatment alternatives for young persons just above Juvenile Court age without their incurring the stigma of a Criminal Record.

## DISCRETION IN SENTENCING

HOUSE . . . (1968) . . . No. 2503

AN ACT AUTHORIZING THE JUSTICE OF THE COURT UPON CONVICTION OF A DEFENDANT TO THE HOUSE OF CORRECTION, TO ORDER THE SENTENCE TO BE SERVED IN PART, AND ORDER SUSPENSION OF THE REMAINDER AND A PROBATIONARY PERIOD IF SO WARRANTED, IN HIS DISCRETION.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1       The provisions of any general or special law notwithstand-
- 2       ing, the justice of the court upon passing judgment of a de-
- 3       fendant after conviction, may order him to serve part of such
- 4       sentence at the house of correction, and may further order
- 5       the placing of such defendant on probation for such time as
- 6       the court feels meet and proper in the case.

This legislation would be a backward step if we are to take it at face value. We would make the observation that it is the Legislature and not the Judiciary which provides the penalties which are to be imposed upon the conviction of a person who has committed a criminal act. The Legislature has expressed the will of the people to the effect that a jail sentence be mandatory under certain circumstances. In other situations, the Legislature has thought it proper to provide a minimum term of years as a penalty. For some offenses the person convicted is required to serve his sentence in the "State Prison".

We have always encouraged progress in any attempt to rehabilitate those who have been convicted of crimes. We have strongly urged the idea of "Work Release" (See the 43rd Report of the Judicial Council, p.95), and we have from time to time discouraged mandatory sentences except in special situations (repeated gambling for example), and we have always supported the wise use of suspended sentences and probation.

Where the statute does not require a mandatory sentence, the judge may now impose a suspended sentence, and may place the offender on probation. This procedure is the rule rather than the exception. No new legislation is needed to permit suspended sentences or probation, unless a term of incarceration is manda-



tory. (See Chapter 279, Secs. 1, 1A and Sections 23 and 26 for example)

Many statutes do not permit a sentence to the house of correction. Arson, Burglary, Murder and Rape are crimes which require a State Prison sentence. This is the penalty provided by the General Court, and if such penalties are to be changed, it would seem that the General Court, and not a trial justice should have the responsibility.

Some statutes such as Chapter 266, Section 30 have a wider provision:—

“Whoever steals.....shall be guilty of larceny, and shall, if the value of the property stolen exceeds one hundred dollars, be punished by imprisonment in the state prison for not more than five years or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen does not exceed one hundred dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars.....”

We are mindful that there are inconsistencies in the penalties provided under the criminal statutes, but the machinery exists for intelligent sentencing. Possibly we should stress a goal of more uniformity in sentencing, especially in the District Courts. A proposal to leave the term entirely to the discretion of the trial judge, would not necessarily bring about more uniformity in sentencing.

Lastly, we can not see how this type of legislation can fit in with modern concepts of correction, probation, and parole.

## CRIMINAL PROSECUTIONS BY LAW STUDENTS

# HOUSE . . . (1968) . . . No. 2716

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AN ACT PROHIBITING CERTAIN PERSONS FROM PROSECUTING CRIMINAL CASES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 12 of the General Laws is hereby amended by
- 2 inserting after section 30 the following section:—
- 3 Section 31. No person may prosecute a criminal case, unless

- 4 he is a member of a law enforcement body, the attorney  
5 general, or assistant attorney general, a district attorney, or  
6 assistant district attorney, or an attorney.

Any consideration of this proposed legislation must contemplate the provisions of Rule 3:11 of the General Rules of the Supreme Judicial Court which reads as follows:—

#### GENERAL RULES

#### 3:11. LEGAL ASSISTANCE TO THE COMMONWEALTH AND TO INDIGENT CRIMINAL DEFENDANTS.

(1) A senior student in a law school in the Commonwealth, with the written approval by the dean of such school of his character, legal ability, and training, may appear without compensation on behalf of the Commonwealth in criminal proceedings in any District Court, provided that the conduct of the case is under the general supervision of a member of the bar of the Commonwealth who is a regular or special assistant district attorney or a regular or special assistant attorney general.

(2) A senior student in a law school in the Commonwealth, with the written approval by the dean of such school of his character, legal ability, and training, may appear without compensation on behalf of indigent defendants in criminal proceedings in any District Court, provided that the conduct of the case is under the general supervision of a member of the bar of the Commonwealth assigned by the court or employed by an approved legal aid society or defender committee.

(3) The expression "general supervision" shall not be construed to require the attendance in court of the supervising member of the bar. The term "senior student" shall mean students who have completed successfully their next to the last year of law school study.

(4) The written approval described in (1) and (2), for a student or group of students, shall be filed with the clerk of the Supreme Judicial Court for the county of Suffolk and shall be in effect, unless withdrawn earlier, until the expiration of eighteen months after such filing or the announcement of the results of the first bar examination following the student's graduation. For any student who passes that examination, the approval shall continue in effect until the date of his admission to the bar.

Under this rule of our Supreme Judicial Court which is the sole judge of the qualifications of those who shall practice in the courts of this Commonwealth, selected third-year law students from our law schools have been actively participating in the trial of criminal cases in our District Courts. For some unknown reason the contributions made to the prosecuting authorities by these students has received lesser attention than the activities of other students who represent the accused.

If our system of criminal justice is to be improved it is now more than ever necessary to make full use of the authority which the Supreme Judicial Court has encompassed under Rule 3:11.

The activities of the students in these programs are under the direct supervision of a member of the Massachusetts Bar who has been assigned to oversee the entire performance in each court. We have discussed the current operations of those who are prosecuting criminal cases under Rule 3:11 and have been satisfied that the personal and professional performance of the students is excellent. Inquiries have been made of lawyers who are now supervising the program in the Metropolitan Boston area.

We are quite sure that none of the justices of the District Courts would permit any student to attempt to become overzealous or oppressive. No case has been brought to our attention in which any student deserves criticism for any improper conduct. A law student with very limited experience can not be as understanding and as knowledgable as a prosecutor of long standing, but supervision is at hand to fill this very human and necessary gap. Defense counsel generally know the supervising attorney and he is available for discussion if need be.

There being no need for this type of legislation, we do not recommend it nor do we think it is wise.

If any complaint exists, or should arise in the future, we would be most willing to review it and do whatever we might find appropriate so that this very useful and valuable training or internship program can continue.

## II. JUDICIAL "RENEWAL"

### THE JUDICIAL COUNCIL

HOUSE . . . . . No. 4189

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### *The Commonwealth of Massachusetts*

In 1968, the Governor urged the passage of this legislation in the following special message.

EXECUTIVE DEPARTMENT  
STATE HOUSE, BOSTON, April 2, 1968

*To the Honorable Senate and House of Representatives:*

Every citizen of our Commonwealth, and indeed of our nation, has a stake in preserving the integrity of our judicial system, which is truly the supreme protector of our individual rights and liberties.

We recognize that our judicial system is weakened, and the precious rights which our forefathers fought to establish are threatened, when our courts become so congested that justice is long delayed and thereby denied. Last year, Your Honorable Bodies acted to meet this crisis by enacting legislation, which was signed by me, authorizing the appointment of four additional associate justices to our Superior Court. Those justices have now been appointed, following a careful screening and evaluation by the Judicial Advisory Committee which I established for this purpose. Although our Superior Court is still seriously undermanned, the addition of these four justices constitutes a major step forward in our common effort to eliminate delays in our courts and thereby serve the ends of justice.

Similarly, we have recognized that the sheer physical limitations of our courthouse facilities have contributed substantially to the problem of congestion in our courts. In response to this need, Your Honorable Bodies have approved, upon my recommendation, legislation establishing a Courthouse Study Commission to evaluate this problem on a comprehensive, state-wide basis. Funds for this Commission have been requested in the deficiency budget message which I submitted to you in February.

Many other areas remain in which we have an opportunity to strengthen our judicial system. One such area involves our method of jury selection.

The Commonwealth presently assigns this important responsibility to election commissioners, who, dedicated though they are, must devote much of their time to other duties. The vast majority of states, however, as well as the Federal courts, have adopted a system whereby juries are selected by special jury commissioners, who are appointed rather than elected, who devote their exclusive efforts to this responsibility, and who are part of the judicial system itself and therefore thoroughly familiar with the problems of the courts.



The latter system of jury selection has been supported almost unanimously by the nation's judges, attorneys, and professors of law, and its adoption in Massachusetts has been recommended over the past thirty years by bar associations, legislative commissions, and the Massachusetts Judicial Council itself. The Chairman of the Judicial Council has stated: ". . . The aim of a jury commissioner system . . . is obviously to make better use of juries at less cost to the taxpayer."

The time is long overdue for Massachusetts to join with other forward-looking jurisdictions in this procedure for streamlining and improving the administration of justice.

I therefore recommend that Your Honorable Bodies adopt the accompanying resolve, designated Appendix A, which would establish a special commission to study the jury commissioner systems employed in the Federal courts and the other states and to devise the best possible method for selecting juries in Massachusetts.

We can take an additional step to improve the operations of our judicial system by expanding the scope and functions of our Judicial Council, to enable the Council to provide a permanent means of official communication between the judiciary and other branches of government, especially with regard to ascertaining and making known the needs of the courts.

Massachusetts took the lead forty-five years ago in establishing the Judicial Council for the purpose of conducting a continuous evaluation of the organization, procedures, and practice of all of our courts. Today every state in the union has such a body, and here in the Commonwealth the Council has rendered outstanding service, most particularly to the Legislature, which refers numerous bills to the Council each session for study.

The Council has continuously advocated the acceptance of new and more efficient methods of improving our judicial system. For example, the Council led the way in the adoption of procedures for the review of criminal sentences in our Superior Court to provide for fairer and more uniform application of the laws; for the use of alternate jurors in protracted criminal cases to prevent mistrials and the resulting additional cost in time, energy, and dollars; for the broadening of the declaratory judgment procedure facilitating speedier and more efficient determination of controversies; for the use of the third-party procedure and consolidation of cases so that the claims of several litigants could be settled in one trial; and for such vital pre-trial reforms as written admissions of fact and oral depositions.

The Council has also been instrumental in improving the administration of the district courts, modernizing and making fairer the eminent domain proceedings, the institution of jury-waived trials, and the protection of indigent defendants in non-capital cases long before the United States Supreme Court made it a mandatory proceeding.

Nevertheless, the problems of the Judiciary have grown faster than our efforts to alleviate them. It is appropriate that we should turn to the Judicial Council for suggestions as to means of meeting these problems and that we should enable the Council to serve as an effective forum, so that matters of importance to the Judiciary can be better communicated to the executive and legislative branches of government.

We believe that this urgently-needed additional service can best be provided by the Council, through an enlargement of its scope, personnel, and resources. It is more sensible to strengthen the existing Council than to create a new body which

might result in greater expense, duplication of efforts, and overlapping of functions.

Therefore, I recommend enactment of the accompanying legislation, designated Appendix B, which would strengthen and expand the scope and functions of the Judicial Council. This legislation would also authorize the Council to employ a law clerk to assist it in performing its duties, and would increase the salary of its Executive Secretary in a manner commensurate with the increase in his duties.

This legislation is similar to that submitted by me last year, except for the addition of a provision directing the Judicial Council to conduct a continuing review of the law of the Commonwealth and to receive proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, bar associations, judges, attorneys, legislators, House and Senate counsel, public officials, and others. With these additional provisions — recommended during the bill's progress through the legislative process — the legislation is the same as that which was approved by the House last year and similar to that which had progressed almost to final approval in the Senate as the session ended.

In a subsequent budget message, I will recommend increased appropriations for the Judicial Council to provide the additional library facilities, clerical help, office space, and funds for printing necessary to enable the Council to fulfill the added responsibilities placed on it by the proposed legislation.

I urge your approval of the accompanying measures so that together we may take two more steps in what must be a continuing effort to improve and modernize the operation of our judicial system.

Respectfully submitted,

JOHN A. VOLPE,  
*Governor of the Commonwealth.*

We are again requesting the General Court to assist us in the effective discharge of our duties by making adequate funds available. It is no longer possible to prepare our annual report and to do the research necessary for an intelligent analysis and decision unless we can obtain a budget which will permit us to operate properly. We can not believe that it can be expected that our work can be done properly if hampered by the lack of adequate personnel and financing.

Plainly and simply, we pay our Secretary an annual salary of \$5000.00 a year for taking the responsibility of handling the administration and routine of the Judicial Council office, answering all of the correspondence that does not require a specific answer from one of the members, the preparation of the legal and other research reports on subjects we are asked to consider, the preparation of all of the reports of the Judicial Council for final consideration and vote, the assembling, writing, and editing of the annual report, the attendance at every meeting of the Council, the attendance at a number of legislative hearings, the preparation of detailed minutes of all matters considered by the Council, and the correspondence between the Council and the public. In addition the Secretary is required to send to each member of the Council a copy of every matter which is considered by us as a group including every bill, letter, report, and even books, magazines, legal periodicals and statistical reports. The secretary is also required to keep in contact with the administrators of the various courts, and with the members of the bench and bar, and to confer with the public.

The stenography and office work requires the employment of at least one skilled legal stenographer. We regret to say that we can not retain the services of a skilled person because we are not given sufficient funds.

We require the services of a law clerk. We do not have one.

No member of the Council receives any payment for his service here. We have seen bills passed by the House in the last two years which would permit us to operate properly. These unopposed bills have had the support of the Massachusetts Bar Association, the lawyers, and the judiciary. In three instances within two years the Governor called attention to our situation in special messages in which he urged that a proper appropriation be

made. Our requests have never been refused but inaction has been the result. We implore early consideration in the 1969 Session.

It would be tedious to repeat all of what we said in our 42nd Report for 1967 at pages 24-31, where this matter was discussed at length.

It is of the greatest importance that the General Court do something to assist us this year. The full benefit that can be realized from a properly financed Judicial Council has not yet been realized and the complexities of our judicial system are growing. We will soon face vast changes in civil and criminal rules and practice.

We recommend two draft acts both of which are suitable for the improvements we require. In the first, we have provided for a salary for our Secretary in the amount of \$10,000.00 a year. We do not presently want a full time Secretary; we prefer one who is himself engaged in practice before the courts. In this way will we be sure that the practical side of our recommendations, as well as the theoretical, is constantly before us. In the other bill we would be empowered to determine the salary of the Secretary without establishing a specific amount in the statute. It might be noted that the present salary was set at \$5000 in 1947 and has never been raised although the general salary scale has probably doubled. It appears that the Secretary of the Council is the only regular state employee who has never received an increase in compensation since the end of World War II.

We wish to make use of a law clerk or research assistant on a full time basis so that increasingly more detailed information can be made available to us.

Finally there is a technical amendment necessary in our statute. We have drafted an amendment so that the chief justice of the probate courts, and the chief justice of the district courts (or their designees) shall be members of the Judicial Council. This measure would cause no change in the present membership of the Council. When our statute was enacted there was no chief justice of the probate courts or of the district courts, and the suggested amendment serves only to take cognizance of recent changes elsewhere.

We recommend either of the following draft acts:—



**1969 DRAFT ACT**

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**AN ACT TO ENLARGE THE SCOPE AND FUNCTIONS OF THE JUDICIAL COUNCIL.**

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*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1        *Section 1.* Section 34A of chapter 221 of the General Laws  
2 is hereby amended by adding at the end thereof the follow-  
3 ing: — Said council shall investigate and evaluate the reason-  
4 able needs of the judiciary on a continuing basis so as to  
5 insure that the court functions at maximum efficiency, and  
6 thereafter to recommend the necessary legislation in regard  
7 thereto.

8        The council shall engage in a continuing examination of  
9 the law of the commonwealth with a view to recommending  
10 such changes as it deems necessary to modify inequitable  
11 rules of law, to correct deficiencies which frustrate the objec-  
12 tives of the law, and to bring the law into harmony with  
13 modern conditions.

14        The council shall receive proposed changes recommended  
15 by the American Law Institute, the National Conference of  
16 Commissioners on Uniform State Laws, bar associations,  
17 judges, lawyers, members of the general court, house and  
18 senate counsel, public officials, as well as any other individu-  
19 als or groups.

1        *Section 2.* Section 34C of chapter 221 of the General Laws  
2 is hereby amended by striking out the final sentence and  
3 inserting in place thereof the following two sentences: — The  
4 secretary of said council, whether or not a member thereof,  
5 shall receive from the commonwealth a salary of ten thou-  
6 sand dollars.

7        The council shall be provided with the full-time services of  
8 a law clerk, who shall be a recent law school graduate and  
9 member of the Massachusetts bar to be selected by the  
10 secretary and to serve on an annual basis at the pleasure of  
11 the council; said law clerk to perform legal research, writing,  
12 and whatever other duties the secretary shall prescribe, at an  
13 annual salary equal to that received by the law clerks of the  
14 superior court and the supreme judicial court.

1        *Section 3.* Section 34A of Chapter 221 of the General  
2 Laws is hereby further amended by striking out the words—one  
3 judge of a probate court in the Commonwealth and one justice of  
4 a district court in the Commonwealth — and inserting in place  
5 thereof the words — the chief justice of the probate courts of  
6 the Commonwealth or some other judge of Probate appointed

7 from time to time by him, and the chief justice of the district  
8 courts of the Commonwealth or some other justice of a district  
9 court appointed from time to time by him —

## 1969 DRAFT ACT

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2 Laws is hereby amended by adding at the end thereof the  
3 following: — Said council shall investigate and evaluate  
4 the reasonable needs of the judiciary on a continuing  
5 basis so as to insure that the court functions at maxi-  
6 mum efficiency, and thereafter to recommend the neces-  
7 sary legislation in regard thereto.

8       The council shall engage in a continuing examination  
9 of the law of the commonwealth with a view to recommend-  
10 ing such changes as it deems necessary to modify inequi-  
11 table rules of law, to correct deficiencies which  
12 frustrate to objectives of the law, and to bring the law  
13 into harmony with modern conditions.

14       The council shall receive proposed changes recommended  
15 by the American Law Institute, the National Conference of  
16 Commissioners on Uniform State Laws, bar associations,  
17 judges, lawyers, members of the general court, house and  
18 senate counsel, public officials, as well as any other  
19 individuals or groups.

1       *Section 2.* Section 34C of chapter 221 of the General  
2 Laws is hereby amended by striking out the final sentence  
3 and inserting in place thereof the following two sen-  
4 tences: — The Secretary of said council, whether or not  
5 a member thereof, shall be a member of the Massachusetts  
6 Bar and shall receive from the Commonwealth a salary to  
7 be fixed by said council.

8       The council shall be provided with the full-time  
9 services of a law clerk, who shall be a recent law  
10 school graduate and a member of the Massachusetts Bar to  
11 be selected by the secretary and to serve on an annual  
12 basis at the pleasure of the council; said law clerk to  
13 perform legal research, writing, and whatever other

14 duties the secretary shall prescribe, at an annual  
15 salary equal to that received by the law clerks of the  
16 superior court and the supreme judicial court.

1       *Section 3.* Section 34A of chapter 221 of the General  
2 Laws is hereby further amended by striking out the  
3 words — “one judge of a probate court in the Commonwealth  
4 and one justice of a district court in the Commonwealth” —  
5 and inserting in place thereof the words — “the chief  
6 justice of the probate courts of the Commonwealth or some  
7 other judge of Probate appointed from time to time by him,  
8 and the chief justice of the District courts of the  
9 Commonwealth or some other justice of a district court  
10 appointed from time to time by him” —

### PROPOSALS FOR AN INTERMEDIATE APPELLATE COURT

During the Constitutional Convention of 1820, Judge Joseph Story of Salem suggested that the legislature could constitutionally create a supreme court of equity “of equal dignity with the supreme court of law.” Although our judicial system did not develop in that fashion it is interesting to read the resolution which was presented to the 1820 constitutional convention which reads in part:

“That the Legislature may, if the public good may require it, establish a court of appeals, to revise the decisions of the supreme courts of law and equity, under such regulations and restrictions, as may by law be prescribed; which court shall consist of not less than \_\_\_\_\_ members nor more than \_\_\_\_\_ members. The judges of the supreme courts of law and equity shall ex-officio be members of such court of appeals; and may respectively assign the reasons of their own decisions but they shall have no voice upon the question of a reversal or affirmance of their own decisions. The other judges of the court of appeals shall be appointed and hold their offices as the Legislature shall direct.”

Judge Story was Chairman of the Judiciary Committee of the 1820 convention and we cite this resolve to demonstrate that there was no question at that time as to the right of the General Court to alter the judicial system to better serve the needs of the commonwealth nor was there any question in Story’s mind that members of an existing court could also sit ex officio as members of a court of appeal. We doubt now that we should be willing to recommend any type of judicial system, in this day and age, where some judges could “assign the reasons for their

own decisions" when the case was being heard on appeal.

If it should be decided that Massachusetts should have a court of appeal to function on an intermediate level, there would appear to be no constitutional reason why such a court could not be placed within the sphere of the present Superior Court as a department or division. The problems inherent in such a plan are many but they are more organizational and administrative than constitutional.

According to a survey by Howard James, Staff correspondent of the Christian Science Monitor published on October 2, 1968, the following is the national situation on Intermediate Appellate Courts: —

<i>State</i>	<i>Inter. App. Court</i>	<i>No. of Judges</i>	<i>Population (Millions)</i>
Ala.	Yes	3	3.4
Ariz.	Yes	6	1.6
Alaska	No	0	0.3
Ark.	No	0	1.9
Cal.	Yes	39	18.0
Col.	No	0	1.9
Conn.	No	0	2.8
Del.	No	0	0.5
Fla.	Yes	20	5.8
Ga.	Yes	9	4.4
Hawaii	No	0	0.7
Ill.	Yes	24	10.6
Ind.	Yes	8	4.9
Iowa	No	0	2.7
Kan.	No	0	2.2
Ky.	No	0	3.1
La.	Yes	20	3.5
Me.	No	0	0.9
Md.	Yes	5	3.5
Mass.	No	0	5.4
Mich.	Yes	9	8.2
Minn.	No	0	3.5
Miss.	No	0	2.3
Mo.	Yes	9	5.0
Mont.	No	0	0.7
Neb.	No	0	1.4
Nev.	No	0	0.4
N.H.	No	0	0.6
N.J.	Yes	12	6.7
N.M.	Yes	4	1.0
N.Y.	Yes	27	18.0
N.C.	Yes	9	5.0

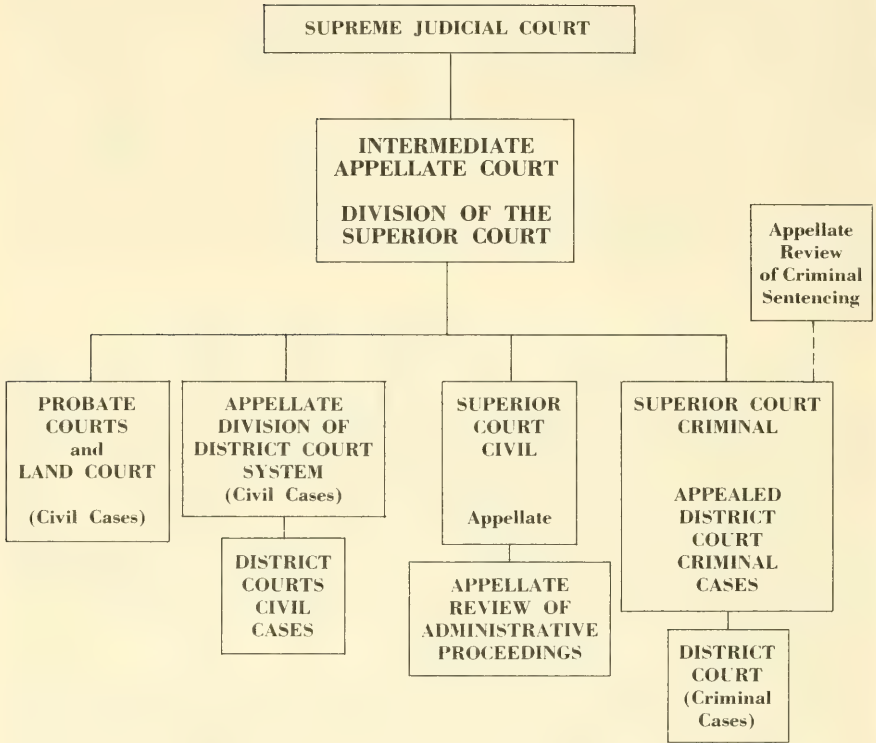


N.D.	No	0	0.6
Ohio	Yes	34	10.2
Okla.	No	0	2.5
Ore.	No	0	1.9
Pa.	Yes	7	11.5
R.I.	No	0	0.9
S.C.	No	0	2.5
S.D.	No	0	0.7
Tenn.	Yes	12	3.8
Texas	Yes	42	10.5
Utah	No	0	0.9
Vt.	No	0	0.4
Va.	No	0	4.4
Wash.	No	0	3.0
W. Va.	No	0	1.8
Wis.	No	0	4.1
Wyo.	No	0	0.3

Various conclusions can be drawn from this analysis. We have not made any inquiry into the details as to each of the courts in this listing but it is apparent that Massachusetts is the only state with over five million population which does not have some sort of intermediate appellate court. The principal reason for relating the intermediate appellate court to the population figure is because of the inevitable increase in judicial business in direct proportion to the population.

This phenomena is better demonstrated by the fact that California has 392 "Superior" court trial judges, and some 926 lower court judges for its 18 million people. With this in mind, the existence of a 39 Judge intermediate appellate court is not too surprising. The Supreme appellate court in California has but seven justices like our own.

Indiana, with a population of 4.9 million, hence close in population to Massachusetts, has 129 "Superior" trial judges and 450 lower court judges. Their intermediate appellate courts have eight judges and the Supreme appellate court has five justices.



**One plan for a proposed Intermediate Appellate Court**

## IMPROVEMENTS IN JUDICIAL ADMINISTRATION

### DISTRICT COURT CONFERENCE

A conference of our District Court judges was held on May 17th and 18th, 1968 at the Boston College Law School. The principal topics discussed at this conference were: —

1. Procedure in Juvenile Cases, the impact of *Application of Gault*, 387 U.S. 1 87 S. Ct. 1428 (1967)
2. Problems of Reasonable Search and Seizure.
3. The Philosophy of Sentencing.

The Judicial Council desires to encourage conferences of this type. The District Court Conference was encouraged by the Committee on Legal Education of the Judicial Conference of Massachusetts, of which Committee the Honorable Paul C. Reardon is Chairman. Through the fine cooperation of Judge Frank J. Murray of the U.S. District Court in Boston, the Section of Judicial Administration of the American Bar Association was of utmost assistance in the District Court Conference and in making the materials available for fruitful discussion by those in attendance.

The inspiration gained by the participants in the conference at Boston College was by no means the least valuable result. Apart from this very worthwhile feature, it was apparent that regular discussions between the judges of the district courts of our commonwealth will tend to make more uniform the administration of justice.

### District Court Conferences

In addition to the Conference of District Court judges held at Boston College in May of 1968 several justices of our District Courts attended conferences in various parts of the nation such as the annual meeting of the National Council on Crime and Delinquency, the Institute of Juvenile Court Judges, the Juvenile Court Judges Association and other meetings.

It is highly desirable that our justices take full advantage of the various professional meetings and conferences relating to judicial administration that are held every year. The interchange of ideas and techniques that results from such conferences, almost all of which are working seminars, is of great benefit in the

expansion of our own experience and in the improvement of the techniques and philosophy of our own judicial administrators and judges.

## REVISION OF CIVIL PROCEDURE

Under the leadership of the Judicial Conference of Massachusetts, a complete revision of the rules of Civil Procedure in the Massachusetts courts has been set in motion during 1968.

A draft version of a new body of Rules of Civil Procedure, patterned on the form of the Federal Rules of Civil Procedure, has been circulated to a panel of experienced lawyers, judges, and law professors which will serve as an advisory committee to the Judicial Conference.

The advisory group will be under the direction of Justice Cornelius J. Moynihan of the Superior Court who will serve as its chairman. This advisory group will report directly to the Committee on Civil Procedure of the Judicial Conference.

We have pointed out in recent reports that our Massachusetts judicial proceedings are governed in part by statute and in part by rule of court, and in a large number of instances by both statute and rule.

To install effectively a comprehensive body of rules will require legislative consideration and action to bring the statutory provisions into line with the rules which are finally agreed upon.

The Federal Rules of Civil Procedure were, of course, not enacted by Congress but were promulgated under the inherent authority of the Judicial Department of the federal government. These rules were laid before Congress before they finally became effective.



### III. CIVIL PRACTICE AND PROCEDURE

#### RETROACTIVE ADOPTION DECREES (NUNC PRO TUNC)

## HOUSE . . . (1968) . . . No. 1629

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AN ACT PERMITTING THE ADOPTION OF CHILDREN NUNC PRO TUNC UNDER CERTAIN CIRCUMSTANCES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 210 of the General Laws is hereby amended by in-
- 2 serting after section 6 the following new section: —
- 3 *Section 6A.* In the event that either of the parties to a
- 4 petition for adoption, which has been filed with the probate
- 5 court, should die prior to the entry of a decree of adoption,
- 6 the probate court may enter a decree within three months
- 7 following the date of death nunc pro tunc to the date of the
- 8 filing of the adoption petition. Said decree shall have all of
- 9 the effect of a decree of adoption.

Under the provisions of General Laws, Chapter 235 Section 4, the Supreme Judicial and the Superior Courts have statutory powers to issue judgments, orders, and decrees nunc pro tunc. It does not appear from the statute that the probate courts have such powers. Although the Equity jurisdiction has been extended to the probate courts, the statutory authority, as opposed to the common law authority of the probate courts to issue such orders is not altogether clear.

Under *Perry v. Wilson*, 7 Mass. 393, there appears to be a common law basis for nunc pro tunc decrees.

“The function of a nunc pro tunc (decree) order in general is to put upon the record and to render efficacious some finding, direction or adjudication of the court made actually or interentially at an earlier time, which by accident, mistake, or oversight was not made matter of record, or to validate some proceeding actually taken but by oversight or mistake not authorized,

or to prevent a failure of justice resulting, directly or indirectly from delay in court proceedings subsequent to a time when a judgment order or decree ought to and would have been entered, save that the cause was pending under advisement."

*Perkins. v. Perkins* 225 Mass. 392, 396

We are confident that the probate courts may enter nunc pro tunc decrees in cases where such procedures are permissible under the reasoning in *Perkins v. Perkins*.

"Nunc pro tunc" means "Now for then" so that the true import of this bill is that if the adopting father should die after having filed a petition for adoption, and before the court has entered a decree of adoption, it would be possible for the court to make its decree effective as of the date the adoption petition was filed.

We speak of the decree of adoption as an "In Rem" proceeding. The significance of such a decree *in rem* is that it is conclusive and binding as against everyone in the world, assuming proper jurisdiction. Thus not only are the parties bound by the decree of the court, but all the world is bound to recognize and honor that decree. In the probate courts, a decree allowing a will as the final disposition of the real and personal property of a decedent is in the nature of a judgment in rem and the will is established as against the whole world. *Bonnemort v. Gill*, 167 Mass. 338.

If an adoption decree is entered on June 1, 1968 it conclusively establishes that on that date the adopted child is the adopted son or daughter of John and Mary Doe. To obtain such a decree the court must establish that John and Mary Doe are living, and that the child is living, and that all procedural steps have been taken. As this decree is entered, the adopting parents and the child will receive a corrected birth certificate indicating that the adopting parents are the mother and father of the child. Such documents must be prepared before the decree is effective. (G.L. Ch. 210 Secs. 5A and 6)

In a few instances, an adopting father has died before the decree was entered by the court. The decree is necessarily delayed because the law passed by the General Court which permits adoptions in Massachusetts distinctly requires that the adopting parents shall have the child with them for one year before the adoption can be finally accomplished. During this

period an investigation is made to determine the suitability of the situation, and it is not impossible that the decree will not be granted in every case. This period of one year is not a "delay in court proceedings" but is a condition of the adoption.

The chief complaint about the existing situation is that if the adopting father does die before the decree, only the mother's name will appear on the corrected birth certificate. We are aware that this is an unfortunate situation. We do not indicate that we have any ready answer.

Until the actual decree is entered, however, the child to be adopted is not the heir of the adopting parents. Life Insurance contracts and property arrangements which specify payments to the "child or children" etc. of the deceased father can not be enforced for the benefit of a child who has yet to be adopted. All manner of benefits under state and federal statutes are involved in such a situation. The legal status of the child has not been established. We can not be sure that in every case where the adopting father dies before the decree, the probate court is required to allow the adoption to proceed.

One comment reaching us is that such a child "has only the adoptive mother's name, as though the child was born out of wedlock." We do not intend to overlook this comment, nor do we overlook the many individuals and agencies who wish to give the child the security of the father's name in such a case. Were it possible to accomplish this and still uphold the integrity of an In Rem decree, employ the concept of "nunc pro tunc" legitimately, and protect the child as well, we would not hesitate to approve the proposed bill, House No. 1629 of 1968.

The adoption decree must, under the present statute, be entered and we would stress this again, only after one year has elapsed during which the adopting parents have had the child. The court can refuse, even after this year, to allow the adoption if the parents are found unfit, or incapable of giving the child a proper home.

We are constrained to say that this proposal is one which is contrary to the legal philosophy which underlies our judicial procedure under which in rem decrees speak as of the date of their entry save in those cases where the system itself is at fault by reason of delay, mistake, or oversight.

**PROTECTION OF WIDOWS AND CHILDREN  
IN WILL CASES**

**HOUSE . . . (1968) . . . No. 2015**

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AN ACT TO PROVIDE FOR THE APPOINTMENT OF A GUARDIAN AD LITEM TO REPRESENT INCOMPETENT CHILDREN OR ISSUE OMITTED FROM WILLS AND TO REQUIRE A PETITION FOR THE PROBATE OF A WILL TO STATE WHETHER ANY OMITTED CHILD OR ISSUE OR THE SURVIVING HUSBAND OR WIDOW IS IN COMPETENT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1        *Section 1.* Chapter 192 of the General Laws is hereby  
2        amended by adding after section B the following new  
3        sections:—

4        *Section 1C.* If it appears in the petition for the probate of  
5        a will that the testator has omitted to provide for a child or  
6        issue of a deceased child who is incompetent by reason of in-  
7        sanity or minority, or is under conservatorship, unless it  
8        appears from the will that the omission was intentional, a  
9        guardian ad litem shall be appointed and made a party to the  
10       petition and shall be given notice of all proceedings relative  
11       to the probate of the will or granting of letters testamentary.

12       *Section 1D.* A petition for the probate of a will shall include  
13       or have annexed a statement by the petitioner as to (a)  
14       whether or not the surviving husband or widow of the deceased  
15       person is incompetent by reason of insanity or minority or is  
16       under conservatorship and (b) whether or not the will omits  
17       to provide for any of the testator's children, whether born  
18       before or after the testator's death, or for the issue of a deceased  
19       child, whether born before or after the testator's death, and, if  
20       there are any such, their names and whether or not they are  
21       incompetent by reason of insanity or minority or are under  
22       conservatorship.

1       *Section 2.* Section One C and One D of chapter one hun-  
2       dred and ninety-two of the General Laws inserted by section  
3       One of this act shall apply to the estates of all persons dying  
4       after December thirty-one, nineteen hundred and sixty-nine.

This proposed statute must be considered together with House No. 2013 of 1968 which would bar any claim in the *real estate* of the testator by his child who was omitted from the will unless



a claim was filed in behalf of such child within six months after the executor had commenced to act by the approval of his bond as executor. Ordinarily this would be the date of the appointment of the executor, but this is not always the case.

If such claims are now to be barred unless seasonably claimed, it will be necessary to be sure that the rights of such children are fully protected. To do this, in the case of a child under 21 or a child who is mentally ill (insanity) or under conservatorship, it is necessary to provide for some one to represent such child. As the interests of the other members of the family, or the heirs and devisees would be in conflict with those of such a child, neither the executor, nor the surviving parent, nor the attorney representing the estate nor any other person with adverse interests could be properly permitted to represent such child.

We believe that the rights of the "child" in the service of his country should be protected also. Whether the combination of his military service and the distance from home, and his inexperience really gives him a fair opportunity to protect his rights at a time when others in the family may wish to get things settled quickly, we might question. It would therefore be highly appropriate to be sure that adequate protection is given in such cases. Six months is a short time in a legal proceeding such as the probate of an estate. Young people away from home including young adults at school or college, or having employment away from their families should have adequate time to protect their interests.

At the hearings before the General Court in 1968 it was suggested that in place of section "1D" in House 2015 of 1968 there should be a more positive statement by the petitioner for the probate of the will as to whether a guardian ad litem is needed. A petitioner may not be able to make a statement which conclusively states that some interested person is a minor, incompetent, mentally ill or otherwise under disability. To meet this probable situation, we would substitute a new section "1D", so that the petitioner could also indicate a lack of knowledge on his part concerning the disabilities. If such a statement was made indicating a lack of knowledge, the court would promptly appoint a guardian ad litem.

We would also make some changes in Section 1 for the purposes of consistency and to further protect the rights of those involved. We therefore recommend the following:—

## 1969 DRAFT ACT

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1        *Section 1* Chapter 192 of the General Laws is hereby  
2 amended by adding after section B the following new sections:—

3        SECTION 1C. If it appears in the petition for the probate of  
4 a will or in any paper or document filed in the Registry of Pro-  
5 bate in connection with said petition, that the testator has  
6 omitted to provide in his will for any of his children, whether  
7 born before or after his death, or for the issue of a deceased  
8 child, whether born before or after the testator's death, and if it  
9 shall appear that any such child, or the issue of any deceased  
10 child is incompetent by reason of mental illness, minority, or is  
11 under conservatorship, or is in the military service of the United  
12 States or its allies, unless it appears from the will that such  
13 omission was intentional and not occasioned by accident or  
14 mistake, a guardian ad litem shall be appointed and made a  
15 party to the petition for the probate of the will and shall be  
16 given notice by the petitioner of all proceedings relative to the  
17 probate of the will or granting of letters testamentary.

18        SECTION 1D. A petition for the probate of a will shall in-  
19 clude or shall have annexed to it a sworn statement signed by  
20 the petitioner as to (a) whether or not the surviving husband or  
21 widow of the deceased person is incompetent by reason of men-  
22 tal illness, minority, or under conservatorship, or is in the mili-  
23 tary service of the United States or its allies, and if the peti-  
24 tioner is unable to make such a statement, said petitioner shall  
25 state that he does not know whether or not such surviving  
26 widow or husband is incompetent or in the military service,  
27 and (b) whether or not the will omits to provide for any of the  
28 testator's children, whether born before or after the testator's  
29 death, or for the issue of a deceased child, whether born before  
30 or after the testator's death, and, if there are any such, their  
31 names and whether they are incompetent by reason of mental  
32 illness, minority, or are under conservatorship, or are in the  
33 military service; or if the petitioner can not make such a state-  
34 ment, a statement that the petitioner does not know whether or  
35 not said children, or child, or the issue of any deceased are in-  
36 incompetent or are in the military service, shall be made.

1        *Section 2* Section 1C and 1D of Chapter 192 of the Gen-  
2 eral Laws inserted by Section 1 of this act shall apply to the  
3 estates of all persons dying after December 31, 1969.

CLAIMS OF CHILDREN OMITTED  
FROM A WILL

HOUSE . . . (1968) . . . No. 2013

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AN ACT TO EXEMPT REAL ESTATE FROM THE OPERATION OF THE OMITTED CHILD  
STATUTE UNLESS A CLAIM IS SEASONABLY FILED.

*Be it enacted by the Senate and House of Representatives in General Court  
assembled, and by the authority of the same, as follows:*

1        *Section 1.* Section 20 of chapter 191 of the General Laws  
2        is hereby amended by adding at the end thereof the follow-  
3        ing:—provided, however, that no such child or issue shall  
4        take any share in the testator’s estate unless a claim therefor  
5        is filed in the registry of probate by or on behalf of such child  
6        or any of such issue within six months after the date of ap-  
7        proval of the bond of the executor.

1        *Section 2.* Section one of this act shall apply to the  
2        estates of all persons dying after December thirty-one, nine-  
3        teen hundred and sixty-eight.

CHAPTER 191 Section 20 now reads as follows:—

§20. Child Not Provided for in Will.

If a testator omits to provide in his will for any of his children, whether born before or after the testator’s death, or for the issue of a deceased child, whether born before or after the testator’s death, they shall take the same share of his estate which they would have taken if he had died intestate, unless they have been provided for by the testator in his lifetime or unless it appears that the omission was intentional and not occasioned by accident or mistake.

We must immediately point out that this proposal must be enacted only if our recommended draft act based on House 2015 of 1968, or legislation designed to accomplish the same results, is also enacted at the same time.

We would also note that the proposed time limit on the filing of claims by those children who may be omitted from the will by mistake or accident, is only six months. In consideration of this measure it was indicated that as in the case of the late Robert F. Kennedy a child could be conceived before the death of the

father but not actually born until after his death. The late Senator Kennedy for example was killed in June but his daughter was not born until December. Until the actual birth, the necessity for representation would be a vexatious affair. In another place we comment on adoption decrees. If such a decree was made "nunc pro tunc" establishing the adopted child as an heir prior to the death of his father, an even more interesting situation would develop.

We would very definitely suggest that the minimum time be established as one year from the date of the appointment of the executor rather than six months. Again, we observe that this is a statute proposed by the Massachusetts Conveyancers Association as a measure to remedy the situation where an omitted child or issue comes to light many years after the probate of the will.

In attempting to clarify the real estate titles it is necessary not to prejudice the rights of the persons who have a legitimate interest to protect. Many statutes have been enacted which provide that, in the case of real property, rights are forever lost unless those entitled to them come forward and make a claim within a certain number of years or months after an effective date. The soundness of such legislation, after all, hangs on a threadlike principle that ignorance of the law is no excuse. We do not wish to deprive anyone of a right unless there is a clear, practical, intelligible and convenient method of claiming that right, and a method which at least the majority of our citizens can know or can make an inquiry.

The title of House No. 2013 suggests to us that the petitioners purpose and intent was to exempt "*Real Estate*" from the operation of the "Omitted Child Statute", and at the hearings on this bill the parties supporting it confined their discussion exclusively to real property.

The wording of the Bill (House No. 2013 of 1968) seems to go beyond the purpose of those who supported it in that it would probably bar the claim of an omitted child, or issue of a deceased child, to personal property as well as real estate. On the basis of what the petitioners sought from the General Court, we would therefore substitute the following draft act:—



AN ACT TO EXEMPT REAL ESTATE FROM THE OPERATION OF THE OMMITTED CHILD  
STATUTE UNLESS A CLAIM IS SEASONABLY FILED.

- 1        *Section 1.* Section 20 of Chapter 191 of the General Laws  
2        is hereby amended by adding at the end thereof the follow-  
3        ing:— provided, however, that no such child or issue shall take  
4        any share in any real property in the testator's estate unless a  
5        claim is filed in the registry of probate by or in behalf of such  
6        child or any of such issue within one year after the date of the  
7        approval of the bond of the executor.
- 1        *Section 2* Section one of this act shall apply to the estates  
2        of all persons dying after December thirty one, nineteen hun-  
3        dred and seventy.

**DISCRIMINATION CASES  
LIABILITY OF EMPLOYER?**

**HOUSE . . . (1968) . . . No. 1831**

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AN ACT TO PROVIDE THAT A PRINCIPAL SHALL BE LIABLE FOR THE DISCRIMINATORY  
ACTS OF HIS AGENT, SERVANT OR EMPLOYEE.

*Be it enacted by the Senate and House of Representatives in General Court  
assembled, and by the authority of the same, as follows:*

- 1        Chapter 151B of the General Laws is hereby amended by  
2        inserting after section 6 the following new section:—  
3        *Section 6A.* Where the superior court of the commonwealth  
4        has entered a decree pursuant to the provisions of section six  
5        which in whole or in part enjoins a respondent from engaging  
6        in any act which is an unlawful practice described in section  
7        four, a finding by the superior court at any subsequent  
8        contempt proceeding that an agent, servant, or employee  
9        while acting within the scope of his authority has violated the  
10       terms of such decree shall be sufficient to constitute a  
11       violation by the respondent.

Under Chapter 151B certain activities which discriminate against some citizens on the basis of “color” or race, religion, etc are prohibited by law. When it is discovered that such activities exist, the Massachusetts Commission Against Discrimination may hold a hearing, and if cause exists, may direct the individ-

ual to refrain from such activities in the future. The sanction available to the Commission Against Discrimination is to seek an injunction from the Superior Court compelling the individual or company to end the discriminatory act.

In a recent case, the proprietor of a Real Estate business in Boston was accused of discrimination against "a Negro" by refusing to rent an apartment because of the "race and color" of the applicant. The proprietor himself did not personally refuse to rent the apartment. It was alleged and proved that one of his employees was responsible.

The Superior Court had previously entered a final decree containing the following injunction:—

- "1. That respondent (the proprietor) cease and desist and in the future refrain from making any inquiry, distinction, discrimination or restriction on account of color or race in the conduct of any phase of respondent's business."
- 2 ...to order all persons who act for him or in his behalf to cease and desist and in the future refrain from making any such distinction, discrimination or restriction."

When the Commission Against Discrimination attempted to hold the proprietor in contempt of court for violation of the above decrees, the Superior Court Judge found that the proprietor himself had not "intentionally or personally" violated the decrees.

It is at this point that the proposed statute would have been of some assistance, according to its supporters.

Had this statute been on the books, the proprietor in the above case would have been guilty of contempt of court when his employee violated the injunction assuming that this could be declared to be Due Process of law.

—It was established that when the discrimination took place, the employee was acting in the course of his employment.

Under the statute proposed, there would be no necessity to show that the proprietor knew what his employee was doing. He could be found guilty of contempt even if he had no knowledge that any discrimination was taking place.

Our Supreme Judicial Court has held in *Massachusetts Commission Against Discrimination vs. Wattendorf* 231 N.E. (2d) 383; \_\_\_\_\_ Mass. \_\_\_\_\_ that if it is not possible to

show that there is "clear and undoubted disobedience," there can be no conviction for contempt.

The principle which is sought to be established by the proposed legislation would be applicable to the employer of one agent, or to an employer with as many employees as General Motors. While it may be more reasonable to assume that a man with one employee would know what his agent was doing, there is no certainty that such is always the case. More important is the fact that a statute of general application should not impose a contempt penalty on a person or corporation which does not engage in "clear and undoubted disobedience."

To attempt to legislate a strict liability on the part of the principal for the unauthorized acts of his agent, and to impose liability to a possible jail term and fine on the principal would seem to us to require substantial proof of guilt.

The Commission appears to feel that to punish the agent and not the principal would be a "travesty of justice." The Commission has urged that the statute, or a rule of law equivalent to it, would leave it open to the principal to discharge the agent from his employment. We do not see that the dilemma presented to the enforcement agency justifies the sweeping away of a bastion of Equity, namely that one can not be presumed to be in contempt. Clear and undoubted disobedience must be proven.

# IV. CRIMINAL LAW AND PROCEDURE

## CODE OF CRIMINAL PROCEDURE

HOUSE . . . (1968) . . . No. 1031

---

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1        *Resolved*, That an unpaid special commission to consist of  
2        three members of the senate, five members of the house of  
3        representatives, the attorney general, a district attorney  
4        selected by the District Attorney's Association, the President  
5        of the Massachusetts Bar Association, the President of the  
6        Boston Bar Association, or their respective designees, and  
7        three persons to be appointed by the governor, is hereby  
8        established to investigate, evaluate and make recommenda-  
9        tions concerning the need for revising the procedural criminal  
10       laws of the commonwealth and the advisability of drafting  
11       and enacting a new procedural criminal code in their place  
12       and the means by which this may be accomplished. The  
13       commission may consult with the governor's Public Safety  
14       Commission.

## A PROCEDURAL CRIMINAL CODE

We are asked as to the advisability of drafting and enacting a new procedural criminal code in place of the statutes and practices which now govern criminal proceedings in this commonwealth. A code of laws applicable to criminal proceedings could conceivably cover the entire chain of proceedings beginning with the investigation of the crime and ending with the execution of the sentence. In general, the procedural part of our statutes covers:—

*Chapter 275* Proceedings to Prevent Crime; arrests of those who threaten to commit crimes; requirement for a bond to keep the peace, etc.

*Chapter 276* Search Warrants, Fugitives from Justice, Arrest, examination, commitment, bail, probation officers and probation.

*Chapter 277* Indictments and Proceedings before Trial; Grand Jury, Complaints in district courts; technical requirements for documents; pro-



ceedings in capital cases; venue; limitation on prosecutions; Arrest; arraignment, nolle prosequi; pleas of the accused etc.

*Chapter 278* Trials and Proceedings before Judgment; procedures in court; appeal of verdicts and findings; records and proceedings on appeal.

*Chapter 279* Judgment and Execution of Sentences; sentences to death, life imprisonment, jails, state prison, etc.

In addition to the express provisions of the statutes, there are the procedures and practices which have been followed since the time of the Pilgrims, some of them thankfully mellowed and humanized by the passage of time. Our criminal procedures are also governed by the body of decisions of the Supreme Judicial Court, and the United States Supreme Court, and to some extent by the Common Law as it may now be applicable.

In no compilation of laws can one find the entire procedural criminal code of the Commonwealth of Massachusetts. And, as we state elsewhere in this report, the criminal law itself is not to be found in one volume or series of books which cover the entire subject from beginning to end.

The American Law Institute has published a proposed "Model Penal Code" (1962 "Proposed Official Draft") which contains some sections on procedure. Another Model Code of the American Law Institute entitled "A Model Code of Pre-Arraignment Procedure" (Draft No. 1 - 1968) purports to codify all the law applicable from the discovery of the crime to the time when an accused is brought before a judge to plead guilty or not guilty to the complaint or indictment.

The questions which naturally arise are (1) Does our law (statutory, precedent, practice, and common law) adequately meet the needs of the Commonwealth so far as criminal procedure is concerned?, and (2) If our present "law" is not adequate, is it better to attempt to revise and correct, *or* should we wipe out that which now exists, statutes, common law, precedents from decisions, and accepted methods of practice, and substitute a new Code of Criminal Procedure?

In recent years, complete penal codes including codifications of criminal procedure have been enacted in Wisconsin, Minnesota, Illinois, and New York, and Kansas.

In its report on the "REVISION OF THE MASSACHUSETTS CRIMINAL CODE" dated March 4, 1968, the Governor's Committee on Law Enforcement and Administration of

Justice” dealt mainly with the substantive criminal law but did mention certain supposed deficiencies in our criminal procedure, among them:—

1. Lack of Coherent Organization of the Present Law.
2. Overlapping of Crimes — Many statutes punish for the same act.
3. Prolivity and redundancy — inconsistent provisions as to similar crimes, and powers of arrest in similar cases, and inconsistent penalties for offenses which are similar.
4. Inexplicable Gaps Remain in the Law — Some anti-social acts are not now crimes.
5. Classification of Offenses — Misdemeanors or Felonies — Although we have only two classes of crimes we have a wide range of penalties for offenses which one might consider equivalent wrongdoing. Some penalties are more severe for less serious offenses.
6. No sentencing Criteria are to be found. Controls for Sexually Dangerous persons and others who are dangerous are not present.

These categories are surely areas where there can be considerable improvement and consistency in the law. As to the six categories listed, we can observe that the necessary improvements could be brought about either by amendments to existing statutes, repeal of statutes which are no longer valuable, and the enactment of new statutes as needed, *or* in the alternative by the enactment of an entire new procedural code which would replace General Laws, Chapters 275 to 279 inclusive; and probably a number of other sections of the General Laws.

The Judicial Council can not conduct the required research into the procedural criminal law because of the limited facilities and finances which are available to it. We do feel, however, that the improvement of the law, especially the criminal law, should not be entirely and completely in the hands of the executive or enforcement branch of government. As in every facet of our American constitutional system, there must be a check and a balance in our society in order that there be a government of laws and not of men. Therefore we wish to reserve the right, in behalf of the pursuit of justice, to pass judgment on any substantive or criminal procedural code. It becomes apparent that the current efforts to produce codifications of the criminal law will take some time to complete.

Under the “Omnibus Crime Control and Safe Streets Act of 1968.” Public Law 90-351, 90th Congress, there will be some planning grants available for the encouragement of States and

units of general local government to prepare and adopt comprehensive law enforcement plans and there are indications that the aspects of crime prevention and law enforcement can be covered by these grants. Whether a procedural criminal code can be assisted by such grants, we do not know. The problem of improving our criminal procedure remains one for the General Court after such research and recommendations as may be financed by an appropriation for that purpose.

## REVISION OF THE CRIMINAL LAW

In June of 1968 the Criminal Law Revision Commission was established by the Governor's Committee on Law Enforcement and Administration of Criminal Justice. This Commission, under the chairmanship of the Attorney General, Eliot Richardson, consists of members of the General Court, judges, district attorneys, law enforcement officials, correction, probation, parole officers, psychiatrists, professors of law, lawyers, and citizens' organization representatives. By virtue of research grants, the Criminal Law Revision Commission is currently engaging in activities leading toward the revision of the substantive criminal law of the Commonwealth.

In the course of its work it is expected that the Criminal Law Revision Commission may deal with matters which are somewhat procedural such as sentencing, probation, and parole. For the most part it is the task of the Commission to deal with:

- General Principles of Criminal Law,
- Offenses Against Person and Property; and
- Offenses Against the Family, Public Order and Decency.

In its work, this Criminal Law Revision Commission will necessarily consider the preparation of a complete revision of the criminal law of the Commonwealth. Decisions as to whether or not such a revision should be a Code, which would replace all existing common law, statutes, and precedents, has yet to be made. This Commission can only prepare the revision for presentation to the General Court.

We shall certainly see the usefulness of eliminating the inconsistencies in our present criminal statutes, the statutory recognition of present standards of responsibility, and the introduction

of an acceptable consolidation of statutes which are now disorganized and ambiguous in some instances.

It is the plan of the Judicial Council to participate in this work to the extent which is possible. Members of the Council are also active in guiding the work of the Criminal Law Revision Commission towards a useful result.

We are not making any present recommendations as to any procedural criminal code, and should be in some position to better evaluate the situation by the time our next report is published.

### CRIMINAL DISCOVERY

In our 43rd Report at page 73, we discussed proposals for discovery of facts in criminal cases and indicated that we would further report on this matter in 1968.

In our further consideration of the matter we have concluded that no proposals for legislation should be made at this time. Discovery in Civil cases was introduced by Rule 15 of the Rules of the Supreme Judicial Court and we find it is proving highly useful. Both the plaintiff and the defendant may utilize discovery procedures in the civil case and it does not lie with either to refuse to permit oral depositions or inspection of documents or objects in the possession of the other.

In the criminal case, the defendant can refuse to permit any discovery on the basis of his right not to supply evidence against himself. If discovery is allowed, therefore, it seems necessary that the defendant be the one who must initiate the procedure. Both in the Federal Rule 16 of the Federal Rules of Criminal Procedure, and in Rule 3:5 of the Amended Rules Governing the Courts of the State of New Jersey (where Criminal Discovery was introduced October 5, 1967) there is no right given to the prosecution for discovery unless and until the defendant has requested the right in the first instance.

We are of the opinion that this matter should be kept under consideration for some future decision. There has been only limited experience under Federal Rule 16 as amended in 1966, and the New Jersey experience is limited. We therefore recommend the matter be deferred.



The Criminal Discovery rule adopted in New Jersey is as follows:—

**SUPREME COURT OF NEW JERSEY**  
**Amended Rules Governing the Courts of the**  
**State of New Jersey**  
**Effective October 5, 1967**

*Rule 3:5—9A. Notice of Insanity Plea.*

If the defendant intends to rely on the defense of insanity he shall serve a notice of such intention upon the prosecuting attorney when he enters his plea or within 30 days thereafter. For good cause shown, the court may extend the time for service of the notice or make such other order as the interest of justice requires. If the defendant fails to comply with this rule the court may take such action as the ends of justice may require.

*Rule 3:5—11. Discovery and Inspection.*

(a) *Materials Discoverable by Defendant as of Right.* Upon motion made by a defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant

(i) designated books, tangible objects, papers or documents obtained from or belonging to him;

(ii) records of statements or confessions, signed or unsigned, by the defendant or copies thereof;

(iii) defendant's grand jury testimony;

(iv) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are known by the prosecuting attorney to be within his possession, custody or control;

(v) reports or records of prior convictions of the defendant.

(b) *Materials Discoverable by Defendant in the Court's Discretion — Books, Papers and Tangible Objects.* Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of the State.

(c) *Materials Discoverable by Defendant in the Court's Discretion — Witness' Names and Statements.* Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney

(i) to disclose to the defendant the names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information, and to indicate which of those persons he may use as witnesses;

(ii) to permit the defendant to inspect and copy or photograph any

relevant records of statements, signed or unsigned, by such persons or by codefendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior convictions of such persons if known to the prosecuting attorney;

(iii) to permit the defendant to inspect and copy or photograph any relevant grand jury testimony of such persons or codefendants.

(d) *Discovery by the State.* If the court grants discovery or inspection to a defendant

(i) pursuant to Rule 3:5-11 (a) (iv) or (b), it may condition its order by requiring the defendant to permit the State to inspect, copy or photograph any material within the scope of such paragraphs which the defendant intends to use at trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the State's case and that its request is reasonable.

(ii) pursuant to Rule 3:5-11 (c), it may condition its order by requiring the defendant to disclose to the prosecuting attorney the names and addresses of those persons, known to the defendant, whom he intends to use as witnesses at trial and their written statements, if any.

(e) *Documents Not Subject to Discovery.* Except as heretofore specifically provided, this rule does not authorize discovery by a party of reports, memoranda or internal documents made by any other party, his attorneys or agents in connection with the investigation, prosecution or defense of the matter, or discovery by the State of records of statements, signed or unsigned, by a defendant made to defendant's attorney or agents.

(f) *Time, Place and Manner of Discovery and Inspection.* An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection and such terms and conditions as the interest of justice requires.

(g) *Protective Orders.*

(i) *Grounds.* Upon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to Rule 3:5-11 (b) (c) or (d) be denied, restricted or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; protection of confidential relationships and privileges recognized by law; any other relevant considerations.

(ii) *Procedure.* The court may permit the showing, in whole or in part, to be made in the form of a written statement to be inspected by the court alone, and if the court thereafter enters a protective order, the entire text of the State's statement shall be sealed and preserved in the records of the court, to be made available only to the appellate court in the event of an appeal.

(h) *Time of Motions.* A motion under this rule shall be made within 30 days of the entry of a plea or at such reasonable later time as the court permits. The motion shall include all relief sought under this rule.

Additional relief may be granted upon a subsequent motion only on a showing of good cause.

(i) *Continuing Duty to Disclose; Failure to Comply.* If subsequent to compliance with an order issued pursuant to this rule and prior to or during trial, a party discovers or obtains additional material previously requested or ordered subject to discovery or inspection, he shall promptly notify the other party or his attorney or the court of the existence thereof. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate.

*Rule 3:7-3A. Production of a Witness' Statement at Trial.*

(a) *Order for Production at Trial.* If there shall not have been disclosure thereof before trial, the court on defendant's motion made at trial shall order the prosecuting attorney to produce any statement, as described in Rule 3:5-11 (c) (ii), in his possession made by a witness who is about to testify on direct examination on behalf of the State, provided such statement is relevant to the offense charged. If the entire statement is relevant, the court shall order it delivered to the defendant for his examination and use prior to the direct testimony of the witness.

(b) *Production After Court's Inspection; Objections.* If the prosecuting attorney claims that any statement so ordered to be produced contains matter which does not relate to the offense charged, the court shall order the prosecuting attorney to deliver such statement to it for inspection in camera and shall delete such non-relating portions thereof and direct delivery of the remainder of the statement to the defendant. If the defendant objects to such withholding of any portion of the statement, the prosecuting attorney shall preserve the entire statement to be made available to the appellate court in the event of an appeal by the defendant.

(c) *Continuance After Production.* The court may, on motion by a defendant to whom a statement has been delivered, continue the trial for such time as it determines is reasonably required by defendant for examination thereof and his preparation for its use at trial.

(d) *Non-Compliance with Order.* If the prosecuting attorney elects not to comply with an order of the court under paragraphs (a) or (b) of this rule, the witness shall not be permitted to testify for the State.

## ARREST PROCEDURE

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# HOUSE . . . (1968) . . . No. 2956

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FASHIONED CONSISTENT WITH THE CONSTITUTIONAL REQUIREMENTS AS UPHELD BY THE DECISION OF THE MIRANDA CASE, SO CALLED.

1        *Resolved*, That the judicial council be requested to make  
2        an investigation relative to determining whether a more  
3        flexible pre-arraignment code may be fashioned consistent  
4        with the constitutional requirements as upheld by the deci-  
5        sion of the Miranda case, so called, and to include its  
6        conclusions and its recommendations, if any, in relation  
7        thereto, together with drafts of such legislation as may be  
8        necessary to give effect to the same, in its annual report for  
9        the current year.

This resolve concerns the decision in *Miranda v. Arizona*, 384 U.S. 436, decided on June 13, 1966. In this case at page 479, the U.S. Supreme Court decided that a person in custody who is being questioned by police officers, or other agents of the government, must be warned that:—

.....“that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning, should he so desire.”

The reason why this warning is necessary is to insure every person that his right under the Fifth Amendment to the U.S. Constitution, not to be compelled in any criminal case to be a witness against himself, will be preserved. Under Article XII of the “Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts,” the first part of our Massachusetts constitution, no one may be “Compelled to accuse or furnish evidence against himself.”

It can be observed that the bare existence of the language of the clauses in the constitutions of Massachusetts and the United States did not always insure that the right of protection from self incrimination was carefully preserved.

We can not assume that the General Court had a desire to consider any “pre-arraignment code” which did not give the individual person protection from self-incrimination.

One of the common methods of the police officer in these times is to read a “Miranda Card”, as it is called, to the person in custodial detention. An actual “Miranda Card” looks like this:—



**MIRANDA WARNING**

**I am a Police Officer and warn you that:**

- 1. You have the right to remain silent.**
- 2. Anything you say can and will be used against you in a court of law.**
- 3. You have the right to talk to a lawyer and have him present with you while you are being questioned.**
- 4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.**

**WAIVER**

**After the warning and in order to secure a waiver, the following questions should be asked and an affirmative reply secured to each question:**

- 1. Do you understand each of these rights I have explained to you?**
- 2. Having these rights in mind, do you wish to talk to us now?**

In *Terry v. Ohio* 392 U.S. 1, 88 S.Ct. 1868, decided June 10, 1968, it was observed in passing that:—

“Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life....”

The “code” of constitutional rights which the police officer must observe includes (a) a recognition of the right of the individual not to incriminate himself including the rights now covered by the *Miranda* rule, (b) a recognition of the fact that any confession must be voluntary, and that before such a confession the individual must waive his right to remain silent, and (c) the rights of persons to be free from unreasonable searches and seizures.

However “incredibly rich in diversity” the encounter between the police and the citizen, this “code” or set of rules *must* be observed.

Were we to recommend a statute, it could not relax the simple form and clear meaning of the small “Miranda Card” reproduced here.

We could not suggest any legislation which would be consistent with the constitution and at the same time permit a prosecution based on a forced, involuntary, or contrived confession. A

person in custody may talk or confess if he wishes, after being advised and understanding his constitutional and other rights, but his waiver of those rights is subject to scrutiny.

The current state of the law governing police-citizen "codes" of any kind is best summarized by reference to *Sibron v. State of New York*, 392 U.S. 40, 88 S. Ct. 1889. This 1968 decision involved motions to suppress evidence which the defendant claimed was obtained from him in violation of his constitutional rights. Motions of this kind are the defense tools which make the police officer careful to observe the constitutional standards.

The *Sibron* case presented the question of whether or not the New York "Stop and Frisk" law was constitutional. This statute reads

- "1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or any of the crimes specified in section 552 of this chapter, and may demand of him his name, address, and an explanation of his actions.
2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning at which time he shall either return it, if lawfully possessed, or arrest such person."

N.Y. CODE CRIM. PROC. § 180-a

Surely this "Stop and Frisk" law is a "flexible" police tool. It permits a brief threshold inquiry, and even a search. Acting under this law, Patrolman Lasky of the N.Y. City Police Department seized and searched Peters who was acting suspiciously in Lasky's own apartment building. When he "patted" Peters for weapons, as he was permitted to do under the "Stop and Frisk" law, he found a hard object which could have been a knife, but which was in fact an "opaque plastic envelope containing burglars tools."

Under the same statutory authority Officer Martin of the New York Police department observed Sibron consorting on a street corner with known dope addicts. Sibron was not seen to pass any narcotics, and Sibron made another contact with additional addicts at a restaurant. Officer Martin pulled Sibron outside and reached into his pocket finding packets of heroin.

The evidence seized by Officer Lasky, (the burglar tools)

was held to be obtained constitutionally and the evidence obtained by Officer Martin (heroin) was held to be wrongfully obtained. Both officers acted under the same "Stop and Frisk" law, and under the same constitution.

As to the New York statute, Justice Warren, in the Majority opinion for the court said:—

"It purports to authorize police officers to 'stop' people, 'demand' explanations of them and 'search' (them) for dangerous 'weapon(s)' in certain circumstances upon 'reasonable suspicion' that they are engaged in criminal activity and that they represent a danger to the policeman. The operative categories of a §180a are not the categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations. New York, is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement.....and in the process it may call the standards it employs by any names it may choose. It may not however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct."

The Supreme Court in the *Sibron* case said that the question was not so much whether the "Stop and Frisk" law was constitutionally valid but whether the search was valid under the Fourth Amendment. Justice Harlan, concurring with the majority said:

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"Accordingly, we make no pronouncement on the facial constitutionality of § 180-a (Stop & Frisk) The Constitutional point with respect to a statute of this peculiar sort as the Court of Appeals of New York recognized is 'not so much \* \* \* the language employed as \* \* \* the conduct it authorizes...."

We point this out for the consideration of the General Court for the purpose of advising that it is not a question of whether or not a "flexible pre-arraignment code" can be enacted, but rather a question of what will be done under any such "code" the usefulness of which we would doubt.

In a note to his opinion Warren indicates that the Stop and Frisk law may involve a "custodial" stop; a restriction on movement, and thus *possibly* require a Miranda warning. Much would depend on the interpretation (and tact) of the officer doing the stopping and frisking.

Douglas, J., in a concurring opinion said that consorting with (known) criminals may in a particular factual setting be a basis for a policeman to conclude that a criminal project is underway.

“Yet talking with addicts without more rises no higher than suspicion. That is all we have here; and if it is sufficient for a ‘seizure’ (of heroin) and a ‘search’, then there is no such thing as privacy for this vast group of ‘sick’ people.

In our 43rd Report for 1967, at page 67, we discussed this same problem, and suggested a “Stop and Frisk” act at page 70. It was our aim to suggest a “flexible” statute against which the police could test the manner in which they observed the constitutional rights of those they encounter. Our conclusions seem to be sound in light of the *Sibron* case.

Having in mind both Douglas’ reference to narcotic (heroin) addicts as a “vast group of ‘sick’ people”, and also the comment in the *Sibron* decision that “the answer to the question propounded by the policeman may be a bullet,” we refrain from making any recommendations for legislation which we have not previously made in our 43rd Report in 1967.

We might point out that the *Miranda* case rules have now been applied to federal income tax prosecutions and in *Mathis v. United States*, 88 S. Ct. 1503 information obtained from the taxpayer (who was then in jail) by an internal revenue agent was tainted. How far the custody idea will extend we do not know, but it is not merely custody for the offense at hand. It is where a person “is taken into custody, or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning.”

## CONSPIRACIES

# HOUSE . . . (1968) . . . No. 1814

### AN ACT RELATING TO CONSPIRACIES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 274 of the General Laws is hereby amended by
- 2 adding the following section:—
- 3 Section 7. *Conspiracies; punishment.*—Any person who



commits the crime of conspiracy shall be punished as follows:

First, if the purpose of the conspiracy or any of the means for achieving the purpose of the conspiracy is a felony punishable by death or imprisonment for life, by a fine of not more than ten thousand dollars or imprisonment in the state prison for not more than twenty years or in jail for not more than two and one half years or both such fine and imprisonment.

Second, if clause first does not apply and the purpose of the conspiracy or any of the means for achieving the purpose of the conspiracy is a felony punishable by imprisonment in the state prison for a maximum period exceeding ten years, by a fine of not more than ten thousand dollars or imprisonment in the state prison for not more than ten years or in jail for not more than two and one half years or both such fine and imprisonment.

Third, if clauses first and second do not apply and the purpose of the conspiracy or any of the means for achieving the purpose of the conspiracy is a felony punishable by imprisonment in the state prison for not more than ten years, by a fine of not more than five thousand dollars or imprisonment in the state prison for not more than five years or in jail for not more than two and one half years or both such fine and imprisonment.

Fourth, if clauses first through third do not apply and the purpose of the conspiracy or any of the means for achieving the purpose of the conspiracy is a crime, by a fine of not more than two thousand dollars or imprisonment in jail for not more than two and one half years or both.

No provision of this section shall be construed as repealing or amending any other section of the General Laws expressly concerning conspiracy.

There is no statute in the General Laws which deals with the whole subject of Conspiracy. No overt act by a conspirator is necessary in Massachusetts.

"The combination for the illegal purpose or for the use of illegal means is the essence of conspiracy." *Atty. Gen. v. Tufts*, 239 Mass. 458,493.

In *Commonwealth v. Stasiun*, 349 Mass. 38 (1965) our Supreme Judicial Court said that:

"where two or more are jointly engaged in the commission of a crime each is criminally liable and the act of one is the act of all."

but this does not mean that joint action is necessarily a conspiracy.

In *Commonwealth v. Bloomberg*, 302 Mass. 349 it was said

that a conspirator is not, as a matter of law, an aider or abettor in the perpetration of the crimes whose commission he has agreed with others to accomplish. A conspirator need not plunge the dagger into Caesar, he may be in Athens when the deed is done.

Merely because one enters into a conspiracy, it does not follow that he can be prosecuted for the acts which are done in furtherance of that conspiracy if he does not jointly engage in the commission of those acts. Those who conspire to take another's life are not equally punished. Only those who *act* suffer the maximum penalty.

In his dissent in the *Stasiun* case, Justice Kirk says:—

.....“Meanwhile the majority reaffirm the accepted rule that ‘the fundamental distinction between a substantive offence and a conspiracy to commit that offence’ should not be ignored, and that each ‘is a separate and distinct offence and each may be separately punished.’ Among other distinctions recognized in this Commonwealth is that a conspiracy to commit a crime is a misdemeanor, *Commonwealth v. Pelletier*, 264 Mass. 221, 227, *Commonwealth v. McKnight*, 289 Mass. 530, 537, and that all those who participate in it are principals. *Commonwealth v. Drew*, 3 Cush. 279, 284.”

There are no accessories in a misdemeanor; all who take part are therefore principals.

Justice Kirk directs attention to the fact that the distinction between the crime of conspiracy, and the main substantive offence (such as bribery, for example) must be preserved. Again in his dissent he says:—

“To ignore the distinction between the crime of conspiracy and the substantive offence would enable ‘the government through the use of the conspiracy dragnet to convict a co-conspirator of every substantive offence committed by any other member of the group even though he had no part in it or even knowledge of it.’ ”

Although both of these statements appear in Justice Kirk's dissent, they are also found in the majority opinion, albeit in a slightly different posture.

Having established the nature of a conspiracy, and that it is now a misdemeanor, we can also note that G.L. Chapter 274 Sec. 1 provides that “a crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.” Since no misdemeanor cases result in a state prison sentence, the 2½ year limit on a jail or house of correction sentences can apply.

House No. 1814 of 1968 would make a large number of

serious conspiracies into felonies, except those under "Fourth." By providing for state prison terms this crime is made more severe, a conspiracy would be a felony.

There is no question but that a more severe penalty for conspiracy to murder and to commit the more serious crimes is necessary. This bill would provide it.

It has been observed that convictions for conspiracy are aided by the rule in *Commonwealth v. Benesch*, 290 Mass. 125 (1935) which provides that when sufficient evidence has accumulated in the case on trial to support an inference of the existence of a conspiracy, the evidence which had previously been admitted only as to one or another defendant can now be admitted against all of the defendants who were part of the alleged conspiracy. If this rule has been slightly altered by a more recent decision which would allow evidence in the case (de bene) temporarily, subject to being stricken out if one or another defendant was not connected to the conspiracy, the principle is more or less the same at least on appeal, if not with the jury.

Some have commented that under this philosophy the conspiracy indictment can ensnare all those even remotely acquainted with the situation. The subject is exceedingly technical indeed, but mere "guilt by association" can not be permitted to creep into our law un-noticed.

The conspiracy is obviously a secret arrangement difficult of proof at best and often impossible to prove.

Often acts done or declarations made pursuant to the supposed plan of wrongdoing are the only indicia of participation.

We note that in the model penal code, proof of the commission of an overt act is required as a basis for a conspiracy conviction where any but the most serious crimes are involved; not so in Massachusetts.

We believe that the Commonwealth must have more potent weapons to deal with conspiracies to commit serious crimes.

We recommend the bill but we have not made a thorough study of the many criminal statutes of the Commonwealth to determine whether or not the penalties provided for conspiracy are consistent. The gradation in punishments which is found in our statutes is not always realistic, but pending a re-evaluation of this, an act to further punish conspiracy is desirable.

# HOUSE . . . (1968) . . . No. 1813

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## AN ACT RELATIVE TO OBJECTIONS OF DEFENDANTS IN CRIMINAL CASES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 278 of the General Laws is hereby amended by
- 2 inserting after section 31 the following section:—
- 3 Section 31A. Whenever in any criminal proceeding it is
- 4 required by statute or common law or any rule of the court
- 5 that the defendant formally claim an exception to a ruling
- 6 made in his presence by the trial court, it shall be sufficient if
- 7 the defendant makes known to the trial court, at the time of
- 8 the ruling or order, the objection of the defendant.

Under the ancient practice in the courts of this Commonwealth, in criminal cases, it is necessary for the defense counsel not only to object to the admission of some evidence, or to an improper question, but also takes a formal exception to the ruling of the court. A typical exchange might be:—

Q. When did you stop beating your wife?

DEFENSE COUNSEL: I *object*, your honor,

THE COURT: The question may be answered, proceed....

DEFENSE COUNSEL: Your honor will save my *exception* to that ruling.

There is thus, first the objection, and then the ruling, and then the *exception*.

Under the Federal practice in the United States District Courts it is never necessary to save any exception. In the above horrible example the judge is entirely wrong in his ruling but if the defense counsel did not “save” his exception in the record, it is entirely possible that he would waive his right to argue the point to the Supreme Judicial Court. We doubt that any trial lawyer is unfamiliar with the prevailing practice.

Many objections are made during a criminal trial in connection with points of law and procedure which never become of sufficient importance to require the consideration of the appellate court. Some objections are made for tactical reasons, or by reason of trial strategy. The acceptance of the ruling of the court, without registering any exception, tends to produce a trial record where only those points of major significance are digni-



fied or designated with an exception. Exceptions are used in all judicial proceedings in this Commonwealth, and summaries or “Bills” of Exceptions form the basis for many an appeal to the Supreme Judicial Court. Although some contend that the requirement of exceptions could trap the unwary, we have no knowledge of any situation where someone is in prison because his lawyer did not know enough to save an exception to an incorrect ruling of law.

**LIMITING USE OF PRIOR CRIMINAL  
RECORD OF A WITNESS**

**HOUSE . . . (1968) . . . No. 2010**

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AN ACT TO PROVIDE FOR THE PROOF OF CONVICTION OF CRIMES OF DISHONESTY AND OF THE MAKING OF FALSE STATEMENTS TO AFFECT CREDIBILITY.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       Section 21 of chapter 233 of the General Laws is hereby  
2       amended by striking out said section 21 and inserting in place  
3       thereof the following:—  
4       *Section 21. Proof of Conviction of Crimes of Dishonesty*  
5       *and of the Making of False Statements to Affect Credibility.—*  
6       The conviction of a witness of a crime of dishonesty or the  
7       making of a false statement, the judgment of which was entered  
8       within five years prior to the date of his testifying, may be  
9       shown to affect his credibility in either a criminal or civil  
10      action.

The present statute, Chapter 233, Section 21 now reads:

§21. Conviction of Crime May Be Shown to Affect Credibility.

The conviction of a witness of a crime may be shown to affect his credibility, except as follows:

First, The record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.

Second, The record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a

reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

Third, The record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.

It is argued that merely because a person has been convicted of giving a false alarm of fire, or transporting insect pests, trespass on a wharf, defacing a rock, or even blasphemy (all of which are misdemeanors) such convictions, along with convictions for drunkenness, traffic violations, and even crimes of violence, do not necessarily indicate that testimony given subsequent to such convictions should not be believed.

This bill would remove the opportunity for counsel to confront a witness for the government with an old criminal record unless this record contained convictions for "crimes of dishonesty, or the making of a false statement" within five years.

The bill is possibly broad in that it does not describe accurately what is meant by the term "crimes of dishonesty."

The Maine statute is more precise:—

"No person is incompetent to testify in any court or legal proceeding in consequence of having been convicted of an offense, but conviction of a felony, any larceny or any other crime involving moral turpitude may be shown to affect his credibility."

16 Maine Rev. Stats Ann. Sec. 56

The Kansas statute provides:—

"LIMITATIONS ON EVIDENCE OF CONVICTION OF CRIME AS AFFECTING CREDIBILITY. Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused, in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence solely for the purpose of supporting his credibility."

Kansas Statutes, Ann. Sec. 60-421

We wish to make it clear that this proposed statute would apply to all witnesses for the prosecution. In theory a murderer

could appear as a witness for the government, and the fact that he had been convicted of murder or other serious crimes might never be allowed to come out before the jury. The defendant who has committed other crimes may wish to testify in his own behalf but is unable to do so for fear that the jury or the judge will consider what he has done in the past as tending to indicate that he is guilty of the crime with which he is presently charged.

We definitely recommend that there be a change in Section 21 of Chapter 233. This can be in the form of House No. 2010 or alternatively and to meet the objection that House No. 2010 of 1968 is too broad, we recommend the following draft Act.

1969 DRAFT ACT

AN ACT TO LIMIT THE USE OF RECORDS OF PRIOR CONVICTIONS FOR THE PURPOSE OF AFFECTING THE CREDIBILITY OF A WITNESS.

Section 21 of Chapter 233 of the General Laws is hereby amended by striking out said section 21 and inserting in place thereof the following:—

Section 21. Limitations on the Use of Records of Prior Conviction to Affect Credibility—

Evidence of the conviction of a witness for any crime, other than for a crime which involves his dishonesty or the making by him of a false statement within five years prior to the date upon which his testimony is given, shall be inadmissible for the purpose of impairing his credibility, in any civil or criminal action.

If the witness be the accused in a criminal proceeding his prior conviction of a felony or any conviction of a crime involving moral turpitude shall not be offered to impeach his credibility unless he has first offered evidence solely for the purpose of supporting his own credibility. His conviction of a crime involving dishonesty or the making of a false statement, within five years prior to testifying may be shown.

HOUSE . . . (1968) . . . No. 248

AN ACT PROHIBITING THE INCITING OF A RIOT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 269 of the General Laws is hereby amended by

2 inserting after section 1 the following section:—

3       *Section 1A.* Whoever, with the intent to cause a riot, does  
4 an act or engages in conduct which urges a riot, or urges  
5 others to commit acts of force or violence, or the burning or  
6 destroying of property, and at a time and place and under  
7 circumstances which produce a clear and present and imme-  
8 diate danger of acts of force or violence or the burning or  
9 destroying of property, shall be punished by imprisonment in  
10 a jail for six months or by a fine of five hundred dollars, or  
11 both.

12       This section shall not apply to, nor in any way affect,  
13 restrain, or interfere with, otherwise lawful activity engaged  
14 in by or on behalf of a labor organization or organizations by  
15 its members, agents or employees.

In a special message to the General Court in May of 1968, the Governor made this observation:—

“As a result of outbreaks of violence which occurred throughout the country during the summer of 1967, the Attorney General and I last fall directed our respective staffs to examine the Commonwealth’s laws relating to the power of governmental officials to deal with civil disorder, taking into consideration the findings of other states in which such disorders occurred. Together, we have discovered that a number of changes in the law are necessary and have prepared corrective legislation to deal with these problem areas.”

His Excellency noted that riots are not to be dealt with by treating the symptoms:

“I have long been convinced, as have many others, that the real answer to the problems of civil strife and unrest is to get at the root causes — racial prejudice, social injustice, and economic deprivation. The Kerner Report once again repeats this view which has been expressed so often before.”

We can not blind our eyes to the root causes of riots which arise out of racial prejudice, social injustice, and economic deprivation. We would also stress the fact that not all riots and disturbances stem from these causes. It is known that adolescent young ladies can cause riots in their adulation of some syrupy male thrush, and that athletic contests between the South Boston Chippewas and the St. Lazarus Club from East Boston can bring about riots which are not caused by economic deprivation.

Our law does not presently attempt to prohibit gatherings which may (or may not) become unruly and in fact riotous. The psychology in crowds is a well studied social phenomenon, and one wonders how fruitful it would be to enact a statute which would attempt to forbid gatherings which might develop into a



“riot.” Our present statute, General Laws, Chapter 269 Section 1 reads:

§1. Suppression of Unlawful Assembly.

If five or more persons, being armed with clubs or other dangerous weapons, or if ten or more persons, whether armed or not, are unlawfully riotously or tumultuously assembled in a city or town, the mayor and each of the aldermen of such city, each of the selectmen of such town, every justice of the peace living in any such city or town, any member of the city, town, or state police or of the metropolitan district police or of the capitol police, and the sheriff of the county and his deputies shall go among the persons so assembled, or as near to them as may be with safety, and in the name of the commonwealth command all persons so assembled immediately and peaceably to disperse; and if they do not thereupon immediately and peaceably disperse, each of said magistrates and officers shall command the assistance of all persons there present in suppressing such riot or unlawful assembly and arresting such persons:

This, in fact, is the “Riot Act.” Its purpose is to disperse crowds, it does not prohibit conduct which engenders tumult and riot.

The legislation recommended by the Governor included a proposal for a curfew the essential nature of which is as follows:—

“Whenever it appears to the city or town officials described in section two of this act that riot or other form of civil disorder is occurring or threatens to occur, and that the imposition of a curfew is essential to protect the public safety in such city or town, a curfew may be imposed in accordance with this act. The curfew may restrict or prohibit the presence or movement of persons, vehicles, and animals in or on public ways and places, including areas to which the public has a right of access, and also places of amusement and entertainment, vacant lots and other open areas, provided, that reasonable exceptions shall be made for all persons having business of an emergency nature which requires the use of public ways. No curfew may take effect until two hours after a formal declaration by said officials that such a curfew has been imposed. Said declaration shall be in writing and shall set forth all the conditions of such a curfew.”

To deal with the more terrifying problem of arson that swept through the cities of Watts, Newark, Washington, and other communities, but which thankfully did not have such a terrible impact in Massachusetts, the following proposal was made.

“No person shall knowingly have in his possession or under his control a molotov cocktail, or any bottle or other container, any wick or similar device, or any flammable liquid for the purpose of making therefrom a molotov cocktail.

For the purposes of this section, the term “molotov cocktail” shall mean any bottle or other container containing a flammable liquid and fitted with a wick or similar device, which, when ignited and hurled or struck, can be expected to shatter upon impact and cause fire or explosion.

Whoever violates any provision of this section shall be punished by a fine of not more than one thousand dollars or imprisonment for not more than two and one-half years, or both."

The Governor made other recommendations for use of the National Guard across state lines, and for a flexible arrangement of the district and municipal courts to enable them to handle riot situations.

Obviously these measures are intended to meet the necessities of riots which amount to small "revolutions" against the established manner of doing things.

### RIOTS ARE UNLAWFUL AT COMMON LAW

Although there is no statute in Massachusetts which prohibits rioting, it was held in *Commonwealth vs. Runnels*, 10 Mass. 518 (1813) that:—

"To disturb another in the enjoyment of a lawful right is a trespass; and if it is done by members unlawfully combined, the same act is a riot."

In *Com. vs. Runnels* the selectmen of Salem were assembled to receive the votes in the election of April 6, 1812 when Runnels and 50 or more others "unlawfully, riotously and routously" assembled at the public town house and "with shouts and huzzas" they attempted to seize the ballot boxes and for two hours they prevented the voting for state office. The issue of the blockade and the War of 1812 was even more of a controversy than was the Viet Nam war in Chicago in 1968. The court also said the the phrase "in terrorem populi" denominated a riot under English Common law but there may be a riot without terrifying anyone.

In *Commonwealth v. Buzzell*, XVI Pickering 153 (1834) one 17 year old boy was finally the sole individual convicted of any crime on the event of the burning of the Ursuline Convent in a riot which "thousands" attended. The exact number is unknown but it was more than one thousand. Although Buzzell was tried and convicted of arson and not for rioting, the court said:—

".....a tumultuous meeting of three or more persons who actually do an unlawful act of violence, either with or without a common cause or quarrel; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner".....

is a riot.

And in *Commonwealth v. Frishman*, 235 Mass. 449 (1920), Frishman, and other socialist philosophers were indicted for unlawfully, riotously and tumultuously assembling with thirty (30) or more persons and while so unlawfully assembled wounded a policeman with a knife.

This riot took place at a May Day parade in 1919 for which no permit was issued. A policeman tried to stop the parade and was knifed. It was held that the crime of common law riot was duly and legally charged in the indictment. Among the protests made on this occasion were these: "Down With Millionaires— Kill the Cops— To Hell With the Police,— Hurrah Bolsheviks,— To Hell With the American Flag."

In the Model Penal Code of the American Law Institute (1962) a riot is defined as follows:—

- "(1) *Riot*. A person is guilty of riot, a felony of the third degree, if he participates with [two] or more others in a course of disorderly conduct:
- (a) with purpose to commit or facilitate the commission of a felony or misdemeanor;
  - (b) with purpose to prevent or coerce official action; or
  - (c) when the actor or any other participant plans to use a firearm or other deadly weapon."

## PRIOR RESTRAINT ON RIOTS

The specific legislation which was proposed in House No. 248 would create a misdemeanor offense of inciting to riot. The elements of this offense include joining with others to engage in acts of violence and are therefore not wholly different from the elements of a common law riot. There is a great difficulty in proof of intent in many riot cases. While our constitutional liberties require protection for those who wish to engage in public demonstrations, marches, assemblies, and the like, it is difficult to control these gatherings once they have been set in motion. Some inevitably result in riots. Certainly not all are intended to degenerate into riot.

No clearer example of this problem could possibly exist than in the case of the "Civil Rights" march arranged for the city of Londonderry on November 16th, 1968. The following announcements were published in the "Derry Journal" the day

before the scheduled march. The first advertisement by the sponsors of the march reads as follows:—

**CITIZENS' ACTION  
COMMITTEE**

**CIVIL RIGHTS MARCH**

A mass march has been organised in support for the campaign for Civil Rights, particularly to establish the right of all citizens to peaceful non-provocative procession and assembly in a just cause. It will take place Tomorrow (Saturday), 16th November at 3:00 p.m. over the route as arranged — assembly point Waterside Station.

**STEWARDS**

Will meet in main Banqueting Hall, City Hotel, Tonight (Friday), at 8 p.m. Volunteers welcome.

**PUBLIC MEETING**

Will be held in Minor Hall, Guildhall, on Tuesday, 19th November, at 8 p.m. to enable Citizens' Action Committee to report to the public on completion of their month's brief.

**ALL WHO SUPPORT THE CAMPAIGN FOR CIVIL  
RIGHTS ARE INVITED TO ATTEND.**

The second "official" advertisement banned the march planned by the "CITIZENS ACTION COMMITTEE" in the same edition of the Derry Journal, published in Londonderry, Northern Ireland.



**THE PUBLIC ORDER ACT  
(NORTHERN IRELAND), 1951**

**Prohibition of Public Processions and  
Meetings Within Certain Parts of the  
County Borough of Londonderry**

**WHEREAS I, THE RIGHT HONOURABLE WILLIAM CRAIG, Minister of Home Affairs for Northern Ireland, am of opinion that, by reason of the unrest and tension at present existing amongst certain sections of the community, serious public disorder will be occasioned should further public processions or meetings be held in the ancient part of the County Borough of Londonderry within and including the walls;**

**AND WHEREAS I am further of the opinion that the powers exercisable under Section 2 (1) of the Public Order Act (Northern Ireland) 1951, will not be sufficient to prevent serious public disorder being occasioned by the holding of public processions or meetings within the said part:**

**NOW, THEREFORE, I, the Right Honourable William Craig, Minister of Home Affairs, in exercise of the powers conferred upon me by Section 2 (2) of the Public Order Act (Northern Ireland) 1951, do hereby order that the holding of all public processions and meetings (other than a procession or meeting of a kind specified in the succeeding paragraph) in any public highway, road or street in the ancient part of the County Borough of Londonderry, within and including the walls, be prohibited for the period beginning on Thursday, 14th November, 1968, and ending on Saturday, 14th December, 1968.**

**This order shall not apply to any public procession customarily held along a particular route or to any public procession or meeting customarily held on a particular date or occasion.**

**Dated this 13th day of November, 1968.**

**WILLIAM CRAIG,**

**Minister of Home Affairs for Northern Ireland.**

The march in Londonderry did take place and the marchers disregarded the order of the Minister of Home Affairs, Mr. Craig. Disorder resulted. Over one hundred criminal charges resulted from the affair and chief among them was the charge that the parade leaders incited the people to take part in a parade they knew was "banned." Charges of unlawful assembly were also lodged against the parade leaders. We take no special notice of these events except to demonstrate that under English Common law which is applicable in Northern Ireland, as well as in Massachusetts, there can be a conflict between constitutional rights and public order. In the march in Derry the parade leaders, according to our own standards, seemed to have had a right to hold an orderly parade, and as exemplified by the "March on Washington" it was not inevitable that a riot would occur. To contend that a riot was unlikely would be insincere.

Our constitutional principles are such that the United States Supreme Court recently held that an order such as that of the Minister for Northern Ireland was impermissible. In *Carroll vs. President and Commissioners of Princess Anne County*, 89 S. CT. 347 (1968) the Court said—

"We do not here challenge the principle that there are special limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guaranty of the First Amendment. In *Cantwell v. State of Connecticut*, 310 U.S. 296 at 308...this court said that 'No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot.....Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breaches. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech supresses the precise freedom which the First Amendment sought to protect against abridgement."

Justice Fortas noted that the elimination of prior restraints was a "leading purpose" in the adoption of the First Amendment to the United States Constitution.

The prohibition in the Maryland case was the result of an ex parte injunction, with no notice to the "white supremacist" agitators, and no opportunity for them to have a hearing in the matter. In this regard, the court noted *Williams v. Wallace*, 240

F. Supp. 100 (1965) where the federal judge prevented the State authorities from interfering with the Montgomery March after the march leaders had outlined their plans.

The United States Supreme Court has therefore upheld the right of a group of "white supremacists" to hold a "rally" at which it could reasonably be expected that they would repeat the following conduct:—

"Petitioners' speeches, amplified by a public address system so that they could be heard for several blocks, were aggressive and militarily racist. Their target was primarily Negroes, and secondarily Jews. It is sufficient to observe with the court below that the speakers engaged in deliberately derogatory, insulting, and threatening language, scarcely disguised by disclaimers of peaceful purposes; and that listeners might well have construed their words as both a provocation to the Negroes in the crowd and an incitement to the whites."

because these people did not have a chance to be heard, before their announced "rally" was banned.

It would be easy enough for us to say that legislation which will preserve law and order is desirable, and that it is the apparent purpose of House No. 248 to prevent riots. Violence is not a solution to every riot situation, nor is police action inevitably appropriate.

The table which we attach to this report indicating the major riots in Massachusetts over the past 150 years is ample evidence that law and order is not secured by enacting statutes. Striving for justice for all of us all of the time is far more fruitful.

We have engaged in this thorough discussion for the purpose of stressing that wholesale attempts to restrain freedom of speech and assembly are wholly inappropriate. There are, of course, situations in which the constitutional issues are only secondary. Young men brawling in a bar room are not engaged in their pursuit of constitutional liberty, and a subsequent attempt at jail delivery at the local police station can not be equated with the "Boston Massacre."

To provide the Commonwealth with a measure for the protection of the public which can be used in appropriate cases, we recommend the following:—

## 1968 DRAFT ACT

### AN ACT PROHIBITING THE INCITING OF A RIOT.

Chapter 269 of the General Laws is hereby amended by inserting after section 1 the following section:—

*Section 1 A* Whoever urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm shall be guilty of inciting to riot and shall be punished by imprisonment in a jail for six months or by a fine of five hundred dollars or both.

### Some of Our More Noted Riots

Date	Place	Participants	Cause
1810 Mar. 19	Boston	Federalists — Dem. Repub.	Political
1818 Dec. 17	Boston	Theater Patrons	British Actor Keane
1821 Nov. 5	Boston	Yankees and Irish	"Pope's Day"
1823 June 19	Boston	Yankees and Irish	Competition for Work
1825 July 22	Boston	The Citizenry Aroused	Destruction of the Bee Hive
1825 July 24	Boston	The Citizenry Aroused	Destruction of the Tin Pot
1825 Dec. 26	Boston	Boston Theater	British Actor Keane
1826 July 11-14	Boston	Yankees, Negroes & Irish	Competition for Work
1826 July 14	Boston	Yankees & Irish	Competition & Religion
1828 Feb. 26	So. Boston	Citizens & Firemen	Cause Not Clear
1829 Aug. 8	Boston	Irish & Negroes	Jobs & Housing
1831 May 18	Lowell	Yankees & Irish	Jobs & Religion
1833 Nov. 28	Charlestown	Yankees & Irish	Ethnic Differences
1834 April	Mansfield	Railroad Workers	Labor Troubles
1834 May	Cambridge	Harvard Students	Religious Liberalism
1834 Aug. 9	Charlestown	Yankee Citizenry	Convent Burning
1835 May 17	Wareham	Yankees & Irish	Church Burning
1835 Oct. 21	Boston	Citizens & Abolitionists	Abolition Movement
1837 June 11	Boston	Yankees & Irish	Competition & Religion
1837 Sept. 12	Boston	Yankees & Irish	Poverty & Americanism
1838 May 24	Boston	Citizens & Abolitionists	Abolition Movement
1838 Oct. 19	Boston	Citizens & Detective	Prohibition Law
1840 May 10	Rowley	Railroad Laborers	Labor Dispute
1842 Apr. 23	Boston	Millerite Sect.	Delusion — Religious
1843 Apr. 23	Boston	Millerite Sect.	2nd Delusion
1847 Apr.	Lawrence	Yankees & Irish	Mistake — Competition
1847 June 17	Boston	Native Americans	Provocation Failed
1848 May	Chelsea	Native Americans & Irish	Religious Incidents
1849 Sept. 11	Lowell	The Orange & The Green	Irish Friction
1849 Nov. 30	Boston	Citizens Demonstration	Parkman Murder
1850 Apr. 1	Boston	Abolitionists	Fug. Slave Thos. Sims
1854 Feb. 1	Boston	Citizenry & Irish	Protest of Papal Nuncio



1854 Apr. 25	Cambridge	Harvard Boys & Fireman	Youth and April
1854 May 7	Chelsea	Angel Gabriel & Irish	Religious Bigotry
1854 May 26	Boston	Abolitionists & Others	Fug. Slave Burns
1854 June 2	Boston	Abolitionists & Others	Return of Burns
1854 July 11	Lawrence	Yankees & Irish	Know Nothing Hysteria
1854 Oct. 30	Worcester	Abolitionists	Fug. Slave Catchers
1855 Apr. 3	Worcester	Yankees & Non-Yankees	Know Nothings
1855 July	Dorchester	Yankees & Irish	"Dynamiting" of Church
1860 Dec. 3	Boston	Abolitionists	Small Civil War
1863 Apr. 27	Boston	Sailors & Irish	Harsh Words over Draft
1863 July 11-14	Boston	Militia & Irish	Draft Riots
1864 Sept. 28	Boston	Political Meeting	Disagreement
1870 June 13	North Adams	Chinese Laborers	Labor Dispute
1875 July 12	Lawrence	Irish & Belfasters	Orange & Green
1879 Sept. 17	Fall River	Textile Workers	Labor Dispute
1880 June	Sandwich	Italian Canal Workers	Labor Dispute
1886 Feb. 16	Cambridge	Horse Car Men	Labor Dispute
1894 Feb. 20	Boston	Unemployed Men	State House March
1894 Feb. 24	Boston	Unemployed Labor	State House March
1895 July 4	East Boston	A.P.A. Parade	Religious Bigotry
1902 Mar. 1	Boston	Teamsters	Labor Dispute
1904 Nov. 2	Boston	M.I.T. Students	Protest March
1907 Apr. 3	Boston	Teamsters	Labor Dispute
1912 Jan. 1	Lawrence	Textile Workers	"The Lawrence Strike"
1915 Apr. 15	Boston	"Birth of A Nation" (Movie)	Protest Meeting
1919 May 1	Roxbury	Citizenry — "Reds"	Social Animosity
1919 Sept. 9	Boston	Police Strike	Labor Dispute
1919 Dec. 19	Boston	Charles Ponzi, etc.	Ignorant People
1920 Jan. 2	Boston	"Anarchists"	"The Great Red" Raids
1924 Oct. 20	Worcester	Ku Klux Klan	Konvocation
1928 June 27	New Bedford	Labor Parade	Labor Dispute
1930 Feb. 3	Boston	Unemployed	State House March
1950 Nov. 2	Boston	Miscellaneous	Anti-Semitism
1964 Feb. 26	Boston	"Blacks"	School Boycott
1967 August	Boston	"Blacks"	Protest Riots
1968 Apr. 4	Boston	"Blacks"	Minor Protest Riots
1968 Apr. 30	Boston	Citizenry	Redevelopment Protest
1968 June 25	Boston	"Hippies"	Boston Common
1968 Aug. 5	Boston	"Blacks"	Protest Rioting
1968 Aug. 25	Boston	"M.A.W.S."	Welfare Protest

**Note:** In *Whitney v. California*, 274 U.S. 357, Brandeis said:

".....order cannot be secured merely through fear of punishment for its infraction.....that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."

## VAGRANTS

**HOUSE . . . (1968) . . . No. 2026****AN ACT REPEALING THE LAW AUTHORIZING THE ARREST AND PUNISHMENT OF VAGRANTS.**

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Sections sixty-six and sixty-seven of chapter two hundred and
- 2 seventy-two of the General Laws are hereby repealed.

The statutes in question are as follows, G.L. Chapter 272

“§66. VAGRANTS.

Idle persons who, not having visible means of support, live without lawful employment; persons wandering abroad and visiting tippling shops of houses of ill fame, or lodging in groceries, outhouses, market places, sheds, barns or in the open air, and not giving a good account of themselves; persons wandering abroad and begging, or who go about from door to door, or place themselves in public ways, passages or other public places to beg or receive alms, and who do not come within the description of tramps, as contained in section sixty-three, shall be deemed vagrants, and may be punished by imprisonment for not more than six months in the house of correction.”

§67. ARREST OF VAGRANTS.

Sheriffs, deputy sheriffs, constables and police officers, acting on the request of any person or upon their own information or belief, shall without a warrant arrest and carry any vagrant before a district court for the purpose of an examination, and shall make complaint against him.

Section 66 purportedly defines a vagrant, and makes his existence criminal.

This section of the General Laws is vague in the respect that except for a prohibition of “begging,” it does not set forth any reasonable standard of conduct to which it is expected that a citizen shall adhere. We are aware of a number of people who live without lawful “employment” including “coupon clippers,” students, poets, etc. who might well be found wandering abroad in the open air (or in one of the proscribed places in the statute). Some of these might “place themselves in a public way.”

Were it not for the fact that Section 66 of Chapter 272 has been in force for many decades, it might be thought it was enacted in honor of the “Hippies” or other free souls who had

disconnected themselves with the problems of living. The true intent of this section was to deal with idle and “disorderly” persons. The by-law of the City of Boston is, we think, far more specific:—

“Sect. 80. No person shall, in the Common, Public Garden, or other public grounds of the city, annoy another person; or utter profane, threatening, abusive, obscene, or indecent language or loud outcry; or do any obscene or indecent act; or have possession of, drink, or be under the influence of, intoxicating liquor; or play any game of chance or have possession of any instrument of gambling; or dig up, cut, break, deface, defile, ill-use, handle, take or remove any turf, flower, plant, bush, tree, rock, sign, fence, structure or other thing or part thereof belonging to the city; or cut, break, or remove the ice in or from a pond; or drive an animal, or suffer an animal in his charge to feed or go at large, except a vehicle pushed or drawn by hand and designed to convey children; or throw a stone or other missile; or injure or have possession of a fish, bird, or wild animal; or injure or disturb a bird’s nest or eggs; or set a trap or snare; or drop or place and suffer to remain paper or other refuse, except in receptacles designated therefor.”

Revised Ordinances of 1947 — Boston

Under this by-law, it is not merely the wandering abroad or the occupation of public ways which is prohibited, it is the transgression of a seemingly reasonable set of deportment rules which we think most people would approve. Should a vagrant annoy others, or threaten them, or become intoxicated, or commit some other outrage, a standard has been provided by the by-law against which his act can be tested and found wanting.

We therefore suggest that the present sections 66 and 67 of Chapter 272 should be repealed. Standards of conduct should be established if necessary.

*Commonwealth v. Alegata* 231 N. E2d 201, \_\_\_\_\_ Mass. \_\_\_\_\_ (1967) is a recent decision where our Supreme Judicial Court has ruled that the particular section in question (Section 66) does not state a crime for which punishment may be imposed, and that the words contained in this section are vague and indefinite in a case where the defendant did not actually commit any offense other than being idle and having no visible means of support. visible means of support.

We have already discussed some aspects of this *Alegata* case in our 43rd Report for 1967 at page 88.

In the *Alegata* case, Section 66 of Chapter 272 was attacked on the basis that the mere fact that a human being can be classified as an “Idle person” having no visible means of sup-

port, and living without lawful employment, and nothing more, (a) does not state a crime for which punishment may be imposed and (b) the words which purport to define the prohibited conduct are vague and indefinite.

The Supreme Judicial Court said that the “*challenged portions*” of Section 66 of Chapter 272 are void on their face as “repugnant to the due process clause of the Fourteenth Amendment and to art. 12 of our Declaration of Rights” in the Constitution of Massachusetts which provides:—

.....“No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him.....”

The suggested form of indictment contained in Chapter 277, Section 79, for vagrancy is as follows:—

“That A.B., during the three months next before the making of this complaint, was an idle person who, not having visible means of support, lived without lawful employment (and wandered abroad and visited tippling shops, and lodged in outhouses, and in the open air, and did not give a good account of himself, and wandered abroad and begged, and went about from door to door and placed himself in public places to beg and receive alms.)

*The complaint may stop at the word ‘employment’, or such part of the matter in parentheses may be added as the case requires.”*

The “challenged portion” of Section 266 which has been declared unconstitutional is the first portion of the statutory form of the indictment, before the parentheses. Merely being idle and being unemployed is therefore no crime. Our Supreme Judicial Court has indicated that vagrancy statutes exist in almost every state in the union. Although this type of act may have come under “judicial scrutiny” only recently, the concept of vagrancy has long been employed for “social” purposes. On January 15, 1866, the legislature of Virginia enacted a law defined vagrants as:—

“All persons who, not having wherewith to maintain themselves and their families, live idly and without employment, and refuse to work for the usual and common wages given to the laborers in the like work in the place where they are....”

The Virginia legislature further provided that if the individual, usually a freedman, if not exclusively so, was convicted as a vagrant, he could be hired out and his wages applied to the support of his family. As the legislative plan included “forced



labor" it was set aside by General Terry, the military commander at Richmond, *but only as to freedmen*. Gen. Terry properly saw a vicious circle, with the newly freed slaves being forced to work for whatever was offered or be declared vagrants and thus compelled to work involuntarily.

In 1817 the British Parliament passed one of the regular Insurrection Acts or Coercion Acts under which Ireland was administered. Under this law, the courts were allowed to sentence to seven years transportation (with no appeal) any person who was "idle and disorderly."

The definition under the 1817 Coercion Act was:—

"(1) Anyone found out of his or her dwelling house between two hours after sunset and sunrise, who could not prove to the satisfaction of the tribunal that he or she was upon his or her 'lawful occasions'." (—The mere fact of being out was sufficient authority to a policeman to arrest and detain until trial)

(2) Persons taking unlawful oaths, or (3) having arms, or (4) found between 9 p.m. and 6 a.m. in a public house or unlicensed house in which spirituous liquors were sold and not being inmates or travellers; (5) persons assembled 'unlawfully and tumultuously'; (6) persons having seditious papers unless they disclose the persons from whom they received them."

The legislation in Virginia and in Ireland was preventive in nature, or more precisely a form of social or economic pressure rather than a description of something which was criminal. It is curious to compare the 1817 Irish Coercion Act with Chapter 272, Section 66.

We might also consider the conduct of the "Hippies" who collected on Boston Common in the summer of 1968. Surely these were idle persons without visible means of support and living without employment. Hippies and persons of this rather detached philosophy of life had previously migrated to Cape Cod in the summer months in recent years. The effective means of dealing with collections of citizens indulging in behaviour patterns of this nature is to provide adequate police regulations such as Sections 77 to 80 of the Revised Ordinances of the City of Boston. Whether the mayor can constitutionally forbid a public speech on Boston Common, or in a like area, we have some doubt. It would be obvious that if a bandstand or similar facility were used, some sensible procedure could be demanded.

The relevant portions of the municipal regulations in force in Boston are as follows:—

**“Revised Ordinances of 1947”****Extract****SIDEWALKS.**

Sidewalks.

*Sect. 77.* No person shall use a sidewalk for any purpose which subjects it to more than ordinary wear, or injures the material of which it is composed, unless such sidewalk be, by the owner of the abutting estate, constructed of granite or other stone, in a manner satisfactory to the commissioner of public works, and kept in repair by such owner.

Reg. 1894 c.1.

Ord. 1938,  
c.4.

\*Except in accordance with a special permit granted by the city council and approved by the mayor, no driveway or other opening for the passage of vehicles across a sidewalk shall be constructed to a width of more than ten feet nor shall more than a total of twenty feet in width of the sidewalk in front of any one parcel or two or more contiguous parcels of land owned or occupied by one person, firm or corporation be used for driveways.

**PUBLIC GROUNDS.**

Common and  
public grounds.

*Sect. 78.* No person shall, in or upon the Common, Public Garden or other public grounds of the city, walk, stand or sit upon the grass, or upon the land planted or prepared for planting, or upon a fountain, monument or statue, or a bandstand, wall, fence, or other structure, or within the basin of a pond otherwise than upon ice, or stand or lie upon a bench or sleep thereon, or, not being a woman or child, occupy a bench designated for the exclusive use of women and children,— except that the mayor may from time to time by proclamation and order permit walking, standing and lying upon the grassed land of the Common or any designated part thereof, except the Public Garden, for such days or such parts of days as he shall specify; and he may in like manner by proclamation and order permit sleeping on such days as he shall specify, on any of the benches and any of the grassed lands of the Common or other public grounds, except the Public Garden. Nothing contained in this or in section or in section eighty of this chapter shall be held to prohibit the doing of any act in the reasonable performance of his work or employment by any person acting under the authority or direction of any board or officer in charge of any of the places described in this section.

Ords. 1912  
c. 7.

Public  
addresses.

*Sect. 79.* No person shall, in any of the public grounds, make a public address, expose for sale goods, wares, or merchandise, erect or maintain a booth, stand, tent, or apparatus for purposes of public amusement or show, or coast or engage in a game of ball, football, or other athletic sport, except in accordance with a permit from the mayor.

Ord. Jan. 4,  
1862.

Profanity and  
other offences.

By Laws  
May 12, 1701.

*Sect. 80.* No person shall, in the Common, Public Garden, or other public grounds of the city, annoy another person; or utter profane, threatening, abusive, obscene, or indecent language or loud outcry; or do any obscene or indecent act; or have possession of, drink, or be under the influence of, intoxicating liquor; or play any game of chance or have possession of any instrument of gambling; or dig up, cut, break, deface, defile, ill-use, handle, take or remove any turf, flower, plant, bush, tree, rock, sign, fence, structure or other thing or part thereof belonging to the city; or cut, break, or remove the ice in or from a pond; or drive an animal, or suffer an animal in his charge to feed or go at large, except a vehicle pushed or drawn by hand and designed to convey children; or throw a stone or other missile; or injure or have possession of a fish, bird, or wild animal; or injure or disturb a bird's nest or eggs; or set a trap or snare; or drop or place and suffer to remain paper or other refuse, except in receptacles designated therefor.

These local police regulations or by-laws can be enacted by town meetings and city councils to cover the local necessities. The Cape Cod communities have amply demonstrated that order and discipline can be enforced with intelligence and reason.

Standards of conduct must be established against which the activities of "vagrants" can be tested. If there is physical abuse, obscenity, molesting of women, unsanitary and repulsive conduct, or any other breach of a sensible objective standard, a prosecution can be successful under a properly worded by-law. Many towns should review their by-laws to revise constitutionally insupportable prohibitions on free speech and political activity.

We do not think that Section 66 of Chapter 272 is now truly significant. It would be unwise to enact a mere vagrancy law. In as much as we now have no "tippling houses" and few people lodge in "outhouses", one doubts that anything is forbidden except begging or receiving alms. If the General Court should decide to repeal Section 66 of Chapter 272, we suggest the following draft act:—

### 1969 DRAFT ACT

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#### SEC. 66 VAGRANTS:

Persons wandering abroad and begging, or who go about from door to door or in public or private ways, areas to which the general public is invited, or in other public places for the purpose of begging or to

receive alms, and who do not come within the description of tramps as contained in section sixty-three, shall be deemed vagrants and may be punished by imprisonment for not more than six months in the house of correction.

*Note:—* There are some indications that all of section 66 is unconstitutional and void.



## V. UNIFORM LAWS

HOUSE . . . (1968) . . . No. 3299

AN ACT ESTABLISHING THE REVISED UNIFORM PRINCIPAL AND INCOME ACT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       The General Laws are hereby amended by inserting after  
2       chapter 206 the following chapter:—

## 3 CHAPTER 206A.

## 4 REVISED UNIFORM PRINCIPAL AND INCOME ACT.

5      *Section 1. Definitions.*—As used in this chapter the follow-  
6      ing words and terms shall have the following meanings:—

(1) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income;

(2) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax;

16 (3) "Remainderman" means the person entitled to prin-  
17 cipal, including income which has been accumulated and  
18 added to principal;

19 (4) "Trustee" means an original trustee and any successor  
20 or added trustee.

21        *Section 2.* (a) A trust shall be administered with due  
22 regard to the respective interests of income beneficiaries and  
23 remaindermen. A trust is so administered with respect to the  
24 allocation or receipts and expenditures if a receipt is credited  
25 or an expenditure is charged to income or principal or partly  
26 to each—

(1) In accordance with the terms of the trust instrument,  
notwithstanding contrary provisions of this chapter;

(2) In the absence of any contrary terms of the trust instrument, in accordance with the provisions of this chapter;

31 or  
32 (3) If neither of the preceding rules of administration is  
33 applicable, in accordance with what is reasonable and  
34 equitable in view of the interests of those entitled to income  
35 as well as of those entitled to principal, and in view of the

manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs.

(b) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact the trustee has made an allocation contrary to a provision of this chapter.

*Section 3.* (a) Income is the return in money or property derived from the use of principal, including return received as

(1) Rent of real or personal property, including sums received for cancellation or renewal of a lease;

(2) Interest on money lent, including sums received as consideration for the privilege of prepayment of principal except as provided in section seven on bond premium and bond discount;

(3) Income earned during administration of a decedent's estate as provided in section five;

(4) Corporate distributions as provided in section six;

(5) Accrued increment on bonds or other obligations issued at discount as provided in section seven;

(6) Receipts from business and farming operations as provided in section eight;

(7) Receipts from disposition of natural resources as provided in sections nine and ten;

(8) Receipts from other principal subject to depletion as provided in section eleven;

(9) Receipts from disposition of underproductive property as provided in section twelve.

(b) Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman while the return or use of the principal is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes:

(1) Consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal;

(2) Proceeds of property taken on eminent domain proceedings;

(3) Proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary;

(4) Stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in section six;

(5) Receipts from the disposition of corporate securities as provided in section seven;

(6) Royalties and other receipts from disposition of natural resources as provided in sections nine and ten;

87 (7) Receipts from other principal subject to depletion as  
88 provided in section eleven;

89 (8) Any profit resulting from any change in the form of  
90 principal except as provided in section twelve on under-  
91 productive property;

92 (9) Receipts from disposition of underproductive property  
93 as provided in section twelve;

94 (10) Any allowances for depreciation established under  
95 sections eight and thirteen (a) (2).

96 (c) After determining income and principal in accordance  
97 with the terms of the trust instrument or of this chapter, the  
98 trustee shall charge to income or principal expenses and other  
99 charges as provided in section thirteen.

100 *Section 4. (a) An income beneficiary is entitled to income*  
101 *from the date specified in the trust instrument, or, if none is*  
102 *specified, from the date an asset becomes subject to the trust.*  
103 *In the case of an asset becoming subject to a trust by reason*  
104 *of a will, it becomes subject to the trust as of the date of the*  
105 *death of the testator even though there is an intervening*  
106 *period of administration of the testator's estate.*

107 (b) In the administration of a decedent's estate or an asset  
108 becoming subject to a trust by reason of a will,

109 (1) Receipts due but not paid at the death of the  
110 testator are principal;

111 (2) Receipts in the form of periodic payments (other than  
112 corporate distributions to stockholders), including rent,  
113 interest, or annuities, not due at the date of the death of the  
114 testator shall be treated as accruing from day to day. That  
115 portion of the receipt accruing before the date of death is  
116 principal, and the balance is income.

117 (c) In all other cases, any receipt from an income pro-  
118 ducing asset is income even though the receipt was earned or  
119 accrued in whole or in part before the date when the asset  
120 became subject to the trust.

121 (d) On termination of an income interest, the income  
122 beneficiary whose interest is terminated, or his estate, is  
123 entitled to

124 (1) Income undistributed on the date of termination;

125 (2) Income due but not paid to the trustee on the date  
126 of termination;

127 (3) Income in the form of periodic payments (other than  
128 corporate distributions to stockholders), including rent,  
129 interest, or annuities, not due on the date of termination,  
130 accrued from day to day.

131 (e) Corporate distributions to stockholders shall be treated  
132 as due on the day fixed by the corporation for determination  
133 of stockholders of record entitled to distribution or, if no date  
134 is fixed, on the date of declaration of the distribution by the  
135 corporation.

136 *Section 5. (a) Unless the will otherwise provides and*

137 subject to subjection (*b*), all expenses incurred in connection  
138 with the settlement of a decedent's estate, including debts,  
139 funeral expenses, estate taxes, interest and penalties con-  
140 cerning taxes, family allowances, fees of attorneys and per-  
141 sonal representatives, and court costs shall be charged against  
142 the principal of the estate.

143 (*b*) Unless the will otherwise provides, income from the  
144 assets of a decedent's estate after the death of the testator  
145 and before distribution, including income from property used  
146 to discharge liabilities, shall be determined in accordance  
147 with the rules applicable to a trustee under this chapter and  
148 distributed as follows:

149 (1) To specific legatees and devisees, the income from the  
150 property bequeathed or devised to them respectively, less  
151 taxes, ordinary repairs, and other expenses of management  
152 and operation of the property, and an appropriate portion of  
153 interest accrued since the death of the testator and of taxes  
154 imposed on income (excluding taxes on capital gains) which  
155 accrue during the period of administration;

156 (2) To all other legatees and devisees, except legatees of  
157 pecuniary bequests not in trust, the balance of the income,  
158 less the balance of taxes, ordinary repairs, and other expenses  
159 of management and operation of all property from which the  
160 estate is entitled to income, interest accrued since the death  
161 of the testator, and taxes imposed on income (excluding taxes  
162 on capital gains) which accrue during the period of adminis-  
163 tration, in proportion to their respective interests in the  
164 undistributed assets of the estate computed at times of  
165 distribution on the basis of inventory value.

166 (*c*) Income received by a trustee under subsection (*b*)  
167 shall be treated as income of the trust.

168 *Section 6. (a)* Corporate distributions of shares of the  
169 distributing corporation, including distributions in the form  
170 of a stock split or stock dividend, are principal. A right to  
171 subscribe to shares or other securities issued by the dis-  
172 tributing corporation accruing to stockholders on account of  
173 their stock ownership and the proceeds of any sale of the  
174 right are principal.

175 (*b*) Except to the extent that the corporation indicates  
176 that some part of a corporate distribution is a settlement of  
177 preferred or guaranteed dividends accrued since the trustee  
178 became a stockholder or is in lieu of an ordinary cash  
179 dividend, a corporate distribution is principal if the dis-  
180 tribution is pursuant to

181 (1) A call of shares;

182 (2) A merger, consolidation, reorganization, or other plan  
183 by which assets of the corporation are acquired by another  
184 corporation; or

185 (3) A total or partial liquidation of the corporation,  
186 including any distribution which the corporation indicates is



187 a distribution in total or partial liquidation or any dis-  
188 tribution of assets, other than cash, pursuant to a court  
189 decree or final administrative order by a government agency  
190 ordering distribution of the particular assets.

191 (c) Distributions made from ordinary income by a regu-  
192 lated investment company or by a trust qualifying and  
193 electing to be taxed under federal law as a real estate  
194 investment trust are income. All other distributions made by  
195 the company or trust, including distributions from capital  
196 gains, depreciation, or depletion, whether in the form of cash  
197 or an option to take new stock or cash or an option to  
198 purchase additional shares, are principal.

199 (d) Except as provided in subsections (a), (b), and (c), all  
200 corporate distributions are income, including cash dividends,  
201 distributions of or rights to subscribe to shares or securities or  
202 obligations of corporations other than the distributing cor-  
203 poration, and the proceeds of the rights or property dis-  
204 tributions. Except as provided in subsections (b) and (c), if  
205 the distributing corporation gives a stockholder an option to  
206 receive a distribution either in cash or in its own shares, the  
207 distribution chosen is income.

208 (e) The trustee may rely upon any statement of the  
209 distributing corporation as to any fact relevant under any  
210 provision of this chapter concerning the source or character of  
211 dividends or distributions of corporate assets.

212 *Section 7. (a)* Bonds or other obligations for the payment of  
213 money are principal at their inventory value, except as  
214 provided in subsection (b) for discount bonds. No provision  
215 shall be made for amortization of bond premiums or for  
216 accumulation for discount. The proceeds of sale, redemption,  
217 or other disposition of the bonds or obligations are prin-  
218 cipal.

219 (b) The increment in value of a bond or other obligation  
220 for the payment of money payable at a future time in  
221 accordance with a fixed schedule of appreciation in excess of  
222 the price at which it was issued is distributable as income.  
223 The increment in value is distributable to the beneficiary who  
224 was the income beneficiary at the time of increment from the  
225 first principal cash available or, if none is available, when  
226 realized by sale, redemption, or other disposition. Whenever  
227 unrealized increment is distributed as income but out of  
228 principal, the principal shall be reimbursed for the increment  
229 when realized.

230 *Section 8. (a)* If a trustee uses any part of the principal in  
231 the continuance of a business of which the settlor was a sole  
232 proprietor or a partner, the net profits of the business,  
233 computed in accordance with generally accepted accounting  
234 principles for a comparable business, are income. If a loss  
235 results in any fiscal or calendar year, the loss falls on  
236 principal and shall not be carried into any fiscal or calendar  
237 year for purposes of calculating net income.

(b) Generally accepted accounting principles shall be used to determine income from an agricultural or farming operation, including the raising of animals or the operation of a nursery.

*Section 9. (a)* If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(1) If received as rent on a lease or extension payments on a lease, the receipts are income;

(2) If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owned on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income;

(3) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in the preceding paragraphs of this section shall be appointed on a yearly basis in accordance with this paragraph whether or not any natural resource was being taken from the land at the time the trust was established. Twenty-seven and one half per cent of the gross receipts (but not to exceed fifty percent of the net receipts remaining after payment of all expenses, direct and indirect, computed without allowance for depletion) shall be added to principal as an allowance for depletion. The balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, is income.

(b) If a trustee, on the effective date of this act, held an item of depletable property of a type specified in this section, he shall allocate receipts from the property in the manner used before the effective date of this act, but as to all depletable property acquired after the effective date of this chapter by an existing or new trust, the method of allocation provided herein shall be used.

(c) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses.

*Section 10.* If any part of the principal consist of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with section two (a) (3).

*Section 11.* Except as provided in sections nine and ten, if the principal consists of property subject to depletion, including leaseholds, patents, copyrights, royalty rights, and rights

to receive payments on a contract for deferred compensation, receipts from the property, not in excess of five per cent per year of its inventory value, are income, and the balance is principal.

*Section 12. (a)* Except as otherwise provided in this section, a portion of the net proceeds of sale of any part of principal which has not produced an average net income of at least one per cent per year of its inventory value for more than a year (including as income the value of any beneficial use of the property by the income beneficiary) shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds received, including the value of any property received in substitution for the property disposed of, less the expenses, including capital gains tax, if any, incurred in disposition and less any carrying charges paid while the property was underproductive.

*(b)* The sum allocated as delayed income is the difference between the net proceeds and the amount which, had it been invested at simple interest at four per cent per year while the property was underproductive, would have produced the net proceeds. This sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property and less the value of any beneficial use of the property by the income beneficiary, is income, and the balance is principal.

*(c)* An income beneficiary or his estate is entitled to delay income under this section as if it accrued from day to day during the time he was a beneficiary.

*(d)* If principal subject to this section is disposed of by conversion into property which cannot be apportioned easily, including land or mortgages (for example, realty acquired by or in lieu of foreclosure), the income beneficiary is entitled to the net income from any property or obligation into which the original principal is converted while the substituted property or obligation is held. If within five years after the conversion the substituted property has not been further converted into easily apportionable property, no allocation as provided in this section shall be made.

*Section 13. (a)* The following charges shall be made against income:

(1) Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remainderman, or trustee, interest paid by the trustee, and ordinary repairs;

(2) A reasonable allowance for depreciation on property

subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of any real property used by a beneficiary as a residence or for depreciation of any property held by the trustee on the effective date of this act for which the trustee is not then making an allowance for depreciation;

(3) One half of court costs, attorney's fees, and other fees on periodic judicial accounting, unless the court directs otherwise;

(4) Court costs, attorney's fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise;

(5) One half of the trustee's regular compensation, whether based on a percentage of principal or income, and all expenses reasonably incurred for current management of principal and application of income;

(6) Any tax levied upon receipts defined as income under this chapter or the trust instrument and payable by the trustee.

(b) If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

(c) The following charges shall be made against principal:

(1) Trustee's compensation not chargeable to income under subsections (a) (4) and (a) (5), special compensation of trustees, expenses reasonably incurred in connection with principal, court costs and attorney's fees primarily concerning matters of principal, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee;

(2) Charges not provided for in subsection (a), including the cost of investing and reinvesting principal, the payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses for preparation of property for rental or sale, and, unless the court directs otherwise, expenses incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title of any trust property;

(3) Extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments, but a trustee may establish an allowance for depreciation out of income to the extent permitted by subsection (a) (2) and by section eight;

(4) Any tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income tax by the taxing authority;

(5) If an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount apportioned to the



388 trust, including interest and penalties, even though the  
389 income beneficiary also has rights in the principal.

390 (d) Regularly recurring charges payable from income shall  
391 be apportioned under section four.

392 *Section 14.* Except as specifically provided in the trust  
393 instrument or the will or in this chapter shall apply to any  
394 receipt or expense received or incurred after the effective date  
395 of this chapter by any trust or decedent's estate whether  
396 established before or after the effective date of this chapter  
397 and whether the asset involved was acquired by the trustee  
398 before or after the effective date of this chapter.

399 *Section 15.* This chapter shall be so construed as to  
400 effectuate its general purpose to make uniform the law of  
401 those states which enact it.

402 *Section 16. Severability.*—If any provision of this chapter  
403 or the application thereof to any person or circumstance is  
404 held invalid, the invalidity does not effect other provisions or  
405 applications of the chapter which can be given effect without  
406 the invalid provision or application and to this end the  
407 provisions of this act are severable.

In *Old Colony Trust Company v. Silliman*, 352 Mass. 6, (1967) our Supreme Judicial Court was asked to consider a case arising from a will which contained the language:—

“My said trustees may decide whether accretions to the trust property shall be treated as principal or income, and whether expenses shall be charged to principal or income.”

The trust company was to act as trustee under the will in which this provision was found, and, as to be expected, the trust property was to be managed in such a way that current income went to one group of individuals until the happening of certain events (such as their decease, presumably) and on such termination the principal was to go to charitable organizations. To find a number of persons each with a different interest under a will or a trust, and to find conflicts between groups of beneficiaries is not uncommon.

Justice Whittemore observed that the clause in the will above set forth was not a grant of “absolute” or “uncontrolled” discretion. He said that the instrument as a whole indicated that after payment of income for a determinable period to certain beneficiaries, the estate was to go to charity. In view of this the wording used was held not to substitute the decision of the Old Colony Trust Company for the usual and understood rules applicable to trustees and other fiduciaries when it came to a decision as to

what was principal and what was income. Even where discretion is liberally given to a trustee, and assuming complete honesty, of course, it is still the duty of the trustee to exercise his trust powers "in accordance with reasonable standards and with reasonable regard for usual fiduciary principles."

## ESTABLISHED RULES

In the *Silliman* opinion our Supreme Judicial Court spoke of the "usual well understood rules" which apply to the allocation of principal and income. It is possible that a clause in a will, such as the one here quoted, might excuse the trustee for a deviation from the rules but it does not bestow a general license. This power, said the court,

".....is primarily an administrative power authorizing the trustee in instances of doubt to use its best informed judgment in good faith in the light of what the established rules suggest to the trustee is consistent therewith. This is a means of avoiding the expense of litigation. This power may not be used to shift beneficial interests. It does not authorize favoring either the charitable or the private beneficiaries...."

The suggested Revised Principal and Income Act (House (1968) No. 3299 is a proposed statutory enactment of a set of "established rules."

It is obvious that any man of business experience knows that a bank account in a savings bank may be regarded as principal and the interest which is earned as income. As investments become more complex, however, the rules applicable become more intricate but generally knowable, nevertheless. The suggested act is of such a technical nature that the Council enlisted the aid of several leading experts to assist it in its consideration of this matter. We were fortunate to receive the patient and comprehensive analysis of Mr. Frederick W. London, Vice President of the New England Merchants National Bank, Mr. Howland Warren, Vice President of the Old Colony Trust Company, and also some comments from Mr. John T.G. Nichols 3rd, Vice President of the State Street Bank and Trust Company. Although we contacted other leading Boston trust institutions, no particular interest in the proposed legislation was manifested to us by them. We have

also considered this proposal at meetings of the Council and have some observations to make.

1. The proposed act would govern trust situations already existing although some of its provisions may not have been contemplated. While the rules would be changed for those who have gone on to their reward, others could revise their plans to avoid what seems to them to be objectionable.
2. The treatment of "Underproductive Property" in the proposed act would cause a storm of controversy, as would the introduction of the depreciation concept.
3. In some instances the proposed statute is not consistent with decisions of the Supreme Judicial Court, nor with the developing pattern of trust law.
4. Trust administration is not an exact science like chemistry or physics. While useful and reasonable rules are in effect, and are generally followed, there are many gray areas where exact and precise definitions are not possible at the time such decisions must be made. Good faith, among other things, is always a factor in a disputed situation.
5. A retroactive application of this statute might in certain instances deprive a beneficiary of certain property which he might otherwise receive under the reasonable rules and legal precedents which were in effect at the time the instrument creating the trust became legally effective.
6. A host of technical changes are required.

The comments we make here are those of the Judicial Council and are not to be attributed to any one with whom we have consulted in this matter. The Massachusetts rule regarding principal and income was set forth in *Minot v. Paine* 99 Mass. 101. In addition there is a provision in G.L. Chapter 203 Section 21A establishing the "prudent man rule" when stocks or other securities are involved.

It has been pointed out to us that Massachusetts is a very sophisticated jurisdiction as far as trusts are concerned. It is not only the cradle of liberty but also of trust law and practice. The development of the law applicable to trusts is not static and stagnant. It appears to be the concern of those most directly involved that the enactment of a Principal and Income code will have a stagnating and regressive effect.

Many of the legal principles contained in House (1968) No. 3299 are among the reasonable rules now applicable in Massachusetts. We certainly do not intend to suggest that *all* of the proposed provisions in this bill are found in the law of Massachusetts, and some are inappropriate, we think.

We do not recommend the enactment of this bill without more study and revision.





(1) By a purchaser of subdivided lands for his own account in a single or isolated transaction;

(2) If fewer than twenty-five separate lots, parcels, units or interests in subdivided lands are offered by a person in a period of twelve months;

(3) On which there is a residential, commercial, or industrial building, or as to which there is a legal obligation on the part of the seller to construct such a building within two years from date of disposition;

(4) to persons who are engaged in the business of construction of buildings for resale, or to persons who acquire an interest in subdivided lands for the purpose of engaging and do engage in the business of construction of buildings for resale;

(5) Pursuant to court order;

(6) By any government or government agency;

(7) As cemetery lots or interests.

(b) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter do not apply to:

(1) Offers or dispositions of evidence of indebtedness secured by a mortgage or deed of trust of real estate;

(2) Offers or dispositions of securities or units of interest issued by a real estate investment trust regulated under any state or federal statute;

(3) A subdivision as to which the plan of disposition is to dispose to ten or fewer persons;

(4) A subdivision as to which the agency has granted an exemption as provided in section ten;

(5) Offers or dispositions of securities currently registered with the department of corporation and taxation, and

(6) Offers or dispositions of any interest in oil, gas or other minerals or any royalty interest therein if the offers or dispositions of such interests are regulated as securities by the United States or by the department of corporation and taxation.

*Section 4.* Unless the subdivided lands or the transaction is exempt by section 3:

(1) No person may offer or dispose of any interest in subdivided lands located in this commonwealth, nor offer or dispose in this commonwealth of any interest in subdivided lands located without this commonwealth prior to the time the subdivided lands are registered in accordance with this chapter.

(2) No person may dispose of any interest in subdivided lands unless a current public offering statement is delivered to the purchaser and the purchaser is afforded a reasonable opportunity to examine the public offering statement prior to the disposition.

*Section 5. (a)* The application for registration of sub-

divided lands shall be filed as prescribed by the agency's rules and shall contain the following documents and information:

(1) An irrevocable appointment of the agency to receive service of any lawful process in any non-criminal proceeding arising under this chapter against the applicant or his personal representative;

(2) A legal description of the subdivided lands offered for registration, together with a map showing the division proposed or made, and the dimensions of the lots, parcels, units or interests and the relation of the subdivided lands to existing streets, roads, and other off-site improvements;

(3) The state or jurisdictions in which an application for registration or similar document has been filed, and any adverse order, judgment, or decree entered in connection with the subdivided lands by the regulatory authorities in each jurisdiction or by any court;

(4) The applicant's name, address, and the form, date, and jurisdiction of organization; and the address of each of its offices in this commonwealth;

(5) The name, address, and principal occupation for the past five years of every director and officer of the applicant or person occupying a similar status or performing similar functions; the extent and nature of his interest in the applicant or the subdivided lands as of a specified date within thirty days of the filing of the application;

(6) A statement, in a form acceptable to the agency, or the condition of the title to the subdivided lands including encumbrances as of a specified date within thirty days of the date of application by a title opinion of a licensed attorney, not a salaried employee, officer or director of the applicant or owner, or by other evidence of title acceptable to the agency;

(7) Copies of the instrument which will be delivered to a purchaser to evidence his interest in the subdivided lands and of the contracts and other agreements which a purchaser will be required to agree to or sign;

(8) Copies of the instruments by which the interest in the subdivided lands was acquired and a statement of any lien or encumbrance upon the title and copies of the instruments creating the lien or encumbrance, if any, with data as to recording;

(9) If there is a lien or encumbrance affecting more than one lot, parcel, unit or interest a statement of the consequences for a purchaser of failure to discharge the lien or encumbrance and the steps, if any, taken to protect the purchaser in case of this eventuality;

(10) Copies of instruments creating easements, restrictions, or other encumbrances, affecting the subdivided lands;

(11) A statement of the zoning and other governmental

regulations affecting the use of the subdivided lands and also of any existing tax and existing or proposed special taxes or assessments which affect the subdivided lands;

(12) A statement of the existing provisions for access, sewage disposal, water, and other public utilities in the subdivision; a statement of the improvements to be installed, the schedule for their completion, and a statement as to the provisions for improvement maintenance;

(13) A narrative description of the promotional plan for the disposition of the subdivided lands together with copies of all advertising material which has been prepared for public distribution by any means of communication;

(14) The proposed public offering statement;

(15) Any other information, including any current financial statement, which the agency by its rules requires for the protection of purchasers.

(b) If the subdivider registers additional subdivided lands to be offered for disposition, he may consolidate the subsequent registration with any earlier registration offering subdivided lands for disposition under the same promotional plan.

(c) The subdivider shall immediately report any material changes in the information contained in an application for registration.

*Section 6. (a)* A public offering statement shall disclose fully and accurately the physical characteristics of the subdivided lands offered and shall make known to prospective purchasers all unusual and material circumstances or features affecting the subdivided lands. The proposed public offering statement submitted to the agency shall be in a form prescribed by its rules and shall include the following:

(1) The name and principal address of the subdivider;

(2) A general description of the subdivided lands stating the total number of lots, parcels, units, or interests in the offering;

(3) The significant terms of any encumbrances, easements, liens, and restrictions, including zoning and other regulations affecting the subdivided lands and each unit or lot, and a statement of all existing taxes and existing or proposed special taxes or assessments which affect the subdivided lands;

(4) A statement of the use for which the property is offered;

(5) Information concerning improvements, including streets, water supply, levels, drainage control systems, irrigation systems, sewage disposal facilities and customary utilities, and the estimated cost, date of completion and responsibility for construction and maintenance of existing and proposed improvements which are referred to in connection with the offering or disposition of any interest in subdivided lands;

(6) Additional information required by the agency to assure full and fair disclosure to prospective purchasers.

(b) The public offering statement shall not be used for any promotional purposes before registration of the subdivided lands and afterwards only if it is used in its entirety. No person may advertise or represent that the agency approves or recommends the subdivided lands or disposition thereof. No portion of the public offering statement may be underscored, italicized, or printed in larger or heavier or different color type than the remainder of the statement unless the agency requires it.

(c) The agency may require the subdivider to alter or amend the proposed public offering statement in order to assure full and fair disclosure to prospective purchasers, and no change in the substance of the promotional plan or plan of disposition or development of the subdivision may be made after registration without notifying the agency and without making appropriate amendment of the public offering statement. A public offering statement is not current unless all amendments are incorporated.

*Section 7.* Upon receipt of an application for registration in proper form, the agency shall forthwith initiate an examination to determine that:

(1) The subdivider can convey or cause to be conveyed the interest in subdivided lands offered for disposition if the purchaser complies with the terms of the offer, and when appropriate, that release clauses, conveyances in trust or other safeguards have been provided;

(2) There is reasonable assurance that all proposed improvements will be completed as represented;

(3) The advertising material and the general promotional plan are not false or misleading and comply with the standards prescribed by the agency in its rules and afford full and fair disclosure;

(4) The subdivider has not, or if a corporation, its officers, directors, and principals have not, been convicted of an involving land dispositions or any aspect of the land sales business in this commonwealth, the United States, or any other state or foreign country within the past ten years and has not been subject to any injunction or administrative order within the past ten years restraining a false or misleading promotional plan involving land dispositions;

(5) The public offering statement requirements of this chapter have been satisfied.

*Section 8. (a)* Upon receipt of the application for registration in proper form, the agency shall issue a notice of filing to the applicant. Within ninety days from the date of the notice of filing, the agency shall enter an order registering the subdivided lands or rejecting the registration. If no order of rejection is entered within ninety days from the date of notice of filing, the land shall be deemed registered unless the applicant has consented in writing to a delay.



(b) If the agency affirmatively determines, upon inquiry and examination, that the requirements of section seven have been met, it shall enter an order registering the subdivided lands and shall designate the form of the public offering statement.

(c) If the agency determines upon inquiry and examination that any of the requirements of section seven has not been met, the agency shall notify the applicant that the application for registration must be corrected in the particulars specified within ten days. If the requirements are not met within the time allowed the agency shall enter an order rejecting the registration which shall include the findings of fact upon which the order is based. The order rejecting the registration shall not become effective for twenty days during which time the applicant may petition for reconsideration and shall be entitled to a hearing.

*Section 9. (a)* Within thirty days after each annual anniversary date of an order registering subdivided lands, the subdivider shall file a report in the form prescribed by the rules of the agency. The report shall reflect any material changes in information contained in the original application for registration.

(b) The agency at its option may permit the filing of annual reports within thirty days after the anniversary date of the consolidated registration in lieu of the anniversary date of the original registration.

*Section 10. (a)* The agency shall prescribe reasonable rules which shall be adopted, amended, or repealed (in compliance with state procedure as provided for in chapter thirty A. The rules shall include but not be limited to provisions for advertising standards to assure full and fair disclosure; provisions for escrow or trust agreements or other means reasonably to assure that all improvements referred to in the application for registration and advertising will be completed and that purchasers will receive the interest in land contracted for; provisions for operating procedures; and other rules as are necessary and proper to accomplish the purpose of this chapter.

(b) The agency by rule or by an order, after reasonable notice and hearing, may require the filing of advertising material relating to subdivided lands prior to its distribution.

(c) If it appears that a person has engaged or is about to engage in an act or practice constituting a violation of a provision of this chapter or a rule or order hereunder, the agency, with or without prior administrative proceedings may bring an action in the superior court to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder. Upon proper showing, injunctive relief or temporary restraining orders shall be granted, and a receiver or conservator may be appointed. The agency is not required to post a bond in any court proceedings.

(d) The agency may intervene in a suit involving subdivided lands. In any suit by or against a subdivider involv-

ing subdivided lands, the subdivider promptly shall furnish the agency notice of the suit and copies of all pleadings.

(e) The agency may:

(1) Accept registrations filed in other states or with the federal government;

(2) Contract with similar agencies in this commonwealth or other jurisdictions to perform investigative functions;

(3) Accept grants in aid from any source.

(f) The agency shall cooperate with similar agencies in other jurisdictions to establish uniform filing procedures and forms, uniform public offering statements, advertising standards, rules and common administrative practices.

(g) The agency may exempt a subdivision of ten or fewer lots, parcels, units or interests from the provisions of this chapter if it determines that the plan of promotion and disposition is primarily directed to persons in the local community in which the subdivision is situated.

*Section 11. (a) The agency may:*

(1) Make necessary public or private investigations within or outside of this commonwealth to determine whether any person has violated or is about to violate this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder;

(2) Require or permit any person to file a statement in writing, under oath or otherwise as the agency determines, as to all the facts and circumstances concerning the matter to be investigated.

(b) For the purpose of any investigation or proceeding under this chapter, the agency or any officer designated by rules may administer oaths or affirmations, and upon its own motion or upon request of any party shall subpoena witnesses, compel their attendance, take evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts or any other matter reasonably calculated to lead to the discovery of material evidence.

(c) Upon failure to obey a subpoena or to answer questions propounded by the investigating officer and upon reasonable notice to all persons affected thereby, the agency may apply to superior court for an order compelling compliance.

(d) Except as otherwise provided in this chapter, all proceedings under this chapter shall be in accordance with the state administrative procedure as provided for in chapter thirty A.

*Section 12. (a) If the agency determines after notice and hearing that a person has:*

(1) Violated any provision of this chapter;

(2) Directly or through an agent or employee knowingly engaged in any false, deceptive, or misleading advertising, promotional, or sales methods to offer or dispose of an interest in subdivided lands;

(3) Made any substantial change in the plan of disposition and development of the subdivided lands subsequent to the order of registration without obtaining prior written approval from the agency;

(4) Disposed of any subdivided lands which have not been registered with the agency;

(5) Violated any lawful order or rule of the agency it may issue an order requiring the person to cease and desist from the unlawful practice and to take such affirmative action as in the judgment of the agency will carry out the purposes of this chapter.

(b) If the agency makes a finding of fact in writing that the public interest will be irreparably harmed by delay in issuing an order, it may issue a temporary cease and desist order. Prior to issuing the temporary cease and desist order, the agency whenever possible by telephone or otherwise shall give notice of the proposal to issue a temporary cease and desist order to the person. Every temporary cease and desist order shall include in its terms a provision that upon request a hearing will be held promptly to determine whether or not it becomes permanent.

*Section 13. (a)* A registration may be revoked after notice and hearing upon a written finding of fact that the subdivider has:

(1) Failed to comply with the terms of a cease and desist order;

(2) Been convicted in any court subsequent to the filing of the application for registration for a crime involving fraud, deception, false pretenses, misrepresentation, false advertising, or dishonest dealing in real estate transactions;

(3) Disposed of, concealed, or diverted any funds or assets of any person so as to defeat the rights of subdivision purchasers;

(4) Failed faithfully to perform any stipulation or agreement made with the agency as an inducement to grant any registration, to reinstate any registration, or to approve any promotional plan or public offering statement;

(5) Made intentional misrepresentations or concealed material facts in application for registration.

Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

(b) If the agency finds after notice and hearing that the subdivider has been guilty of a violation for which revocation could be ordered, it may issue a cease and desist order instead.

*Section 14. (a)* A person who has exhausted all administrative remedies available within the agency and who is aggrieved by an order pertaining to registration, a cease and desist order, an order of revocation, or any other final

399 decision of the agency is entitled to judicial review under this  
400 chapter. This section does not limit utilization of or the scope  
401 of judicial review available under other means of review,  
402 redress, relief, or trial de novo provided by law. A prelimi-  
403 nary, procedural, or intermediate agency action or ruling is  
404 immediately reviewable if review of the final agency decision  
405 would not provide an adequate remedy.

406 (b) Proceedings for review are instituted by filing a  
407 petition in the superior court within thirty days after the  
408 final decision of the agency or, if a rehearing is requested,  
409 within thirty days after the decision thereon. Copies of the  
410 petition shall be served upon the agency and all parties of  
411 record.

412 (c) The filing of the petition does not itself stay enforce-  
413 ment of the agency decision. The agency may grant, or the  
414 reviewing court may order, a stay upon appropriate terms.

415 (d) Within thirty days after the service of the petition, or  
416 within further time allowed by the court, the agency shall  
417 transmit to the reviewing court the original or a certified  
418 copy of the entire record of the proceeding under review. By  
419 stipulation of all parties to the review proceedings, the record  
420 may be shortened. A party unreasonably refusing to stipulate  
421 to limit the record may be taxed by the court for the addi-  
422 tional costs. The court may require or permit subsequent cor-  
423 rections or additions to the record.

424 (e) If, before the date set for hearing, application is made  
425 to the court for leave to present additional evidence, and it is  
426 shown to the satisfaction of the court that the additional evi-  
427 dence is material and that there were good reasons for failure  
428 to present it in the proceeding before the agency, the court  
429 may order that the additional evidence be taken before the  
430 agency upon conditions determined by the court. The agency  
431 may modify its findings and decision by reason of the addi-  
432 tional evidence and shall file that evidence and any modifi-  
433 cations, new findings, or decisions with the reviewing court.

434 (f) The review shall be conducted by the court without a  
435 jury and shall be confined to the record. In cases of alleged  
436 irregularities in procedure before the agency, not shown in  
437 the record, proof thereon may be taken in the court. The  
438 court, upon request, shall hear oral argument and receive  
439 written briefs.

440 (g) The court shall not substitute its judgment for that of  
441 the agency as to the weight of the evidence on questions of  
442 fact. The court may affirm the decision of the agency or  
443 remand the case for further proceedings. The court may  
444 reverse or modify the decision if substantial rights of the  
445 appellant have been prejudiced because the administrative  
446 findings, inferences, conclusions, or decisions are:

447 (1) In violation of constitutional or statutory provi-  
448 sions;



- 449 (2) In excess of the statutory authority of the agency;  
450 (3) Made upon unlawful procedure;  
451 (4) Affected by other error of law;  
452 (5) Clearly erroneous in view of the reliable, probative,  
453 and substantial evidence on the whole record; or  
454 (6) Arbitrary or capricious or characterized by abuse of  
455 discretion or clearly unwarranted exercise of discretion.

456 Proceedings for judicial review shall be in accordance with  
457 the state administrative procedures as provided for in chapter  
458 thirty A.

459 *Section 15.* Any person who willfully violates any provision  
460 of this chapter or of a rule adopted under it or any person  
461 who willfully, in an application for registration makes any  
462 untrue statement of a material fact or omits to state a  
463 material fact is guilty of a misdemeanor and may be fined not  
464 less than one thousand dollars but not more than five thousand  
465 dollars; or by imprisonment in a jail or house of correction  
466 for not less than six months nor more than two years, or  
467 both.

468 *Section 16. (a)* Any person who disposes of subdivided  
469 lands in violation of section four, or who in disposing of  
470 subdivided lands makes an untrue statement of a material  
471 fact, or who in disposing of subdivided lands omits a material  
472 fact required to be stated in a registration statement or public  
473 offering statement or necessary to make the statements made  
474 not misleading, is liable as provided in this section to the  
475 purchaser unless in the case of an untruth or omission it is  
476 proved that the purchaser knew of the untruth or omission or  
477 that the person offering or disposing of subdivided lands did  
478 not know and in the exercise of reasonable care could not  
479 have known of the untruth or omission, or that the purchaser  
480 did not rely on the untruth or omission.

481 *(b)* In addition to any other remedies, the purchaser,  
482 under the preceding subsection, may recover the considera-  
483 tion paid for the lot, parcel, unit or interest in subdivided  
484 lands together with interest at the rate of six per cent per  
485 year from the date of payment, property taxes paid, costs,  
486 and reasonable attorneys fees less the amount of any income  
487 received from the subdivided lands upon tender of appro-  
488 priate instruments of reconveyance. If the purchaser no  
489 longer owns the lot, parcel, unit or interest in subdivided  
490 lands, he may recover the amount that would be recoverable  
491 upon a tender of a reconveyance less the value of the land  
492 when disposed of and less interest at the rate of six per cent  
493 per year on that amount from the date of disposition.

494 *(c)* Every person who directly or indirectly controls a  
495 subdivider liable under subsection *(a)*, every general partner,  
496 officer, or director of a subdivider, every person occupying a  
497 similar status or performing a similar function, every em-  
498 ployee of the subdivider who materially aids in the disposi-

tion, and every agent who materially aids in the disposition is also liable jointly and severally with and to the same extent as the subdivider, unless the person otherwise liable sustains the burden of proof that he did not know and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist. There is a right to contribution as in cases of contract among persons so liable.

(d) Every person whose occupation gives authority to a statement which with his consent has been used in an application for registration or public offering statement, if he is not otherwise associated with the subdivision and development plan in a material way, is liable only for false statements and omissions in his statement and only if he fails to prove that he did not know and in the exercise of the reasonable care of a man in his occupation could not have known of the existence of the facts by reason of which the liability is alleged to exist.

(e) A tender of reconveyance may be made at any time before the entry of judgment.

(f) A person may not recover under this section in actions commenced more than four years after his first payment of money to the subdivider in the contested transaction.

(g) Any stipulation or provision purporting to bind any person acquiring subdivided lands to waive compliance with this chapter or any rule or order under it is void.

*Section 17.* Dispositions of subdivided lands are subject to this chapter and the superior court has jurisdiction in claims or causes of action arising under this chapter, if:

(1) The subdivided lands offered for disposition are located in this commonwealth;

(2) The subdivider's principal office is located in this commonwealth; or

(3) Any offer or disposition of subdivided lands is made in this commonwealth whether or not the offeree is then present in this commonwealth, if the offer originates within this commonwealth or is directed by the offeror to a person or place in this commonwealth and received by the person or at the place to which it is directed.

*Section 18.* In the proceedings for extradition of a person charged with a crime under this chapter, it need not be shown that the person whose surrender is demanded has fled from justice or at the time of the commission of the crime was in the demanding or other state.

*Section 19. (a)* In addition to the methods of service provided within the General Laws service may be made by delivering a copy of the process to the office of the agency, but it is not effective unless the plaintiff (which may be the agency in a proceeding instituted by it):

(1) Forthwith sends a copy of the process and of the

549 pleading by registered mail to the defendant or respondent at  
550 his last known address, and

551 (2) The plaintiff's affidavit of compliance with this section  
552 is filed in the case on or before the return day of the process,  
553 if any, or within such further time as the court allows.

554 (b) If any person, including any nonresident of this  
555 commonwealth engages in conduct prohibited by this chapter  
556 or any rule or order hereunder, and has not filed a consent to  
557 service of process and personal jurisdiction over him cannot  
558 otherwise be obtained in this commonwealth, that conduct  
559 authorizes the agency to receive service of process in any non-  
560 criminal proceeding against him or his successor which grows  
561 out of that conduct and which is brought under this chapter  
562 or any rule or order hereunder, 'with the same force and  
563 validity as if served on him personally. Notice shall be given  
564 as provided in subsection (a).

565 *Section 20. Uniformity of Interpretation.*—This chapter  
566 shall be so construed as to effectuate its general purpose to  
567 make uniform the law of those states which enact it.

568 *Section 21.* If any provision of this chapter or the applica-  
569 tion thereof to any person or circumstances is held invalid,  
570 the invalidity does not affect other provisions or applications  
571 of the chapter which can be given effect without the invalid  
572 provisions or application, and to this end the provisions of  
573 this chapter are severable.

We do not recommend this act because (1) it is inappropriate for the Commonwealth of Massachusetts, and (2) we have a considerable body of legislation in force which serves the ends sought by this uniform act.

This is the type of Uniform Act which is probably appropriate for some undeveloped tract in Arizona, New Mexico, or the lesser inhabited regions of Florida or even the frozen wastes of the Yukon.

It would apply to the development of large tracts of 25 or more lots and it would be administered by the Board of Appeal in the municipality in which the subdivision was located.

The purpose of the Uniform Land Sales Practice Act is a beneficial one. It is framed for the protection of the public against fraud, deception, and sharp dealing. It appears to be patterned after the statutes and regulations under which the Securities Exchange Commission operates to prevent the bilking of the public in the sale of stocks, bonds, mutual funds, and other intangible securities, and shares in "Tomorrow".

Section 6(a) of the proposed law would make it mandatory

for a developer to make a FULL DISCLOSURE in a form not unlike the prospectus required by the S.E.C. when a new stock issue is promoted for sale.

The public is protected in Massachusetts by the Subdivision Control Law, (Chapter 41 Sections 81A to 81GG), the Zoning Law, (Chapter 40A Sections 1 to 22) and by various statutes which regulate the use of land, and the erections of structures and improvements.

We do find that there are two sections in the Uniform Land Sales Practice Act (Secs. 15 & 16) which we do not now have in our statutory framework. Under Section 15 any person guilty of misdealing with subdivision lots would be guilty of a misdemeanor and subject to a fine or a jail term. Under Sec. 16 (a) the seller would be liable for making untrue statements and the buyer could recover the entire consideration with interest when untrue statements were made.

It would appear that under the proposed uniform act, the developer would be required to state that, for example, all sewerage and other facilities adequate to serve the area would be installed in a reasonable time. If it should turn out that this statement was untrue or if facts were omitted from the presentation to the buyer which misled him, he could avoid the sale. The provision in this uniform act which gives an injured party a direct right against the seller who has misled him or made a false statement, and the penal sanctions which prohibit this type of conduct might possibly be of interest to the General Court.

The bond required of a sub-divider under the Subdivision Control Law, Chapter 41 Sec. 81U does not always prove to be a complete solution for all of the subdivision lot owners, but it has insured substantial compliance with the plan of the project as approved by the local planning board.

We certainly believe in FULL DISCLOSURE and the protection of the public but have concluded that with the possible exception of an adaptation of Sections 15 and 16, after serious study by the General Court, it would be unwise to engraft this well intended statutory scheme on existing law. We definitely would reject the idea of substituting this concept for the very desirable system we now have.



## VI. TORTS

### WRONGFUL DEATH ACTIONS AND DAMAGES

HOUSE . . . (1968) . . . No. 486

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AN ACT ELIMINATING THE MAXIMUM AMOUNT RECOVERABLE IN ACTIONS FOR DEATH  
AND INJURIES RESULTING IN DEATH.

*Be it enacted by the Senate and House of Representatives in General Court  
assembled, and by the authority of the same, as follows:*

1        *Section 1.* Section 1 of chapter 229 of the General Laws, as  
2        most recently amended by chapter 166 of the acts of 1961, is  
3        hereby further amended by striking out, in line 7, the words  
4        “not exceeding four thousand dollars”.

1        *Section 2.* Section 2 of said chapter 229, as most recently  
2        amended by section 1 of chapter 306 of the acts of 1962, is  
3        hereby further amended by striking out the first sentence and  
4        inserting in place thereof the following sentence:—A person  
5        who (1) by his negligence causes the death of a person in the  
6        exercise of due care, or (2) by wilful, wanton or reckless act  
7        causes the death of a person under such circumstances that  
8        the deceased could have recovered damages for personal  
9        injuries if his death had not resulted, or (3) operates a  
10       common carrier of passengers and by his negligence causes  
11       the death of a passenger, or (4) operates a common carrier of  
12       passengers and by his wilful, wanton or reckless act causes  
13       the death of a passenger under such circumstances that the  
14       deceased could have recovered damages for personal injuries  
15       if his death had not resulted, shall be liable in damages in the  
16       sum of not less than three thousand dollars, said sum to be  
17       assessed with reference to the degree of his culpability and  
18       distributed as provided in section one; except that (1) the  
19       liability of an employer to a person in his employment shall  
20       not be governed by this section, (2) a person operating a  
21       railroad shall not be liable for negligence in causing the death  
22       of a person while walking or being upon such railroad  
23       contrary to law or to the reasonable rules and regulations of  
24       the carrier, and (3) a person operating a street railway or  
25       electric railroad shall not be liable for negligence for causing  
26       the death of a person while walking or being upon that part of

27 the street railway or electric railroad not within the limits of  
28 a highway.

1 *Section 3.* Section 6E of said chapter 229, as most recently  
2 amended by section 7 of chapter 238 of the acts of 1958, is  
3 hereby further amended by striking out the second paragraph  
4 and inserting in place thereof the following paragraph:—

5 The amount of damages which may be awarded in an  
6 action brought under section two B shall not be less than two  
7 thousand dollars.

1 *Section 4.* Said chapter 229 is hereby further amended by  
2 striking out section 11, as most recently amended by section 2  
3 of chapter 298 of the acts of 1960, and inserting in place  
4 thereof the following section:—

5 *Section 11.* In any civil action in which a verdict is given or  
6 a finding made for pecuniary damages for the death, with or  
7 without conscious suffering, or any person, whether or not  
8 such person was in the employment of the defendant against  
9 whom the verdict is rendered or finding made, there shall be  
10 added by the clerk of the court to the amount of the damages  
11 interest thereon from the date of the writ.

## DAMAGES FOR WRONGFUL DEATH

We discussed the problem of money damages for wrongful death in our 40th Report (1964) at page 73 and directed the attention of the General Court to the basic concept of Chapter 229 of the General Laws.

This statute is a “penal” one. Rather than making provision to compensate the widow and heirs according to the actual pecuniary loss that has been suffered, our statutes now allow a minimum of \$5,000 and a maximum of \$50,000.00 depending on the degree of culpability of the person who negligently causes the death of another. In the past twenty years or so the limits have been raised from the 1949 basis of \$2,000 to \$15,000 maximum.

There is in addition to the claim for wrongful death a claim for conscious suffering and pain prior to death. In the event of instant death, such as in an airplane or auto crash, the conscious suffering claim may be of little value to the survivors.

Without laboring each section of the proposed bill (H. 486 of 1968) we feel that our comments in our 40th Report at page 77

represent our current attitude towards the wrongful death statutes in Chapter 229. In 1964 we recommended, and the General Court enacted, an increase in the maximum limit to \$50,000.00.

The question of whether or not our law should attempt to compensate the survivors of one killed as the result of negligence is one which has been, to our knowledge, debated for well over one hundred years. In the Constitutional Convention of 1853, Benjamin F. Hallett proposed to amend the Declaration of Rights in our Constitution, and his Committee reported the following resolve:—

“RESOLVED That where death is caused through negligence or misconduct, by means of railroads, steam boats, or public conveyances for hire, the same remedies shall be open in a suit at law as for like injuries to the person resulting in disability and not in death.”

We doubt if a clearer precedent is possible. Today airliners and automobiles take the same toll that railroads and steamboats caused in 1853. Hallett argued that “the government should protect the lives as well as the property of citizens.” In the month before the 1853 convention met, some 222 people met death in railroad and steamboat accidents. Hallett would have inserted a constitutional guarantee and he said:—

“...the courts of law in Massachusetts have decided that, by the common law, if a man is injured on a railroad by having an arm or leg broken, he is entitled to a remedy; but that if he is killed, no damage is done whatever. That is the rule of law.”

In a truly eloquent plea, Hallett urged that the right to compensatory or pecuniary loss damages for wrongful death should be put into the constitution as a “beacon light to guard and protect human life.”

Again, and in an answer to Hallett, Mr. Davis of Plymouth stated the philosophy of the law which exists today:—

“Does the Committee mean that the rule of damages shall apply to injuries resulting in death, that apply now to injuries which do not result in death? Or does the Committee mean to say a jury shall be called upon *without any limit*, to estimate, in broad terms the value of life? What is the limit? It seems to me, that, if called upon as a juror, as perhaps I may be, to consider that question, I might say that the value of a man’s life was a million of dollars, and this constitutional provision might require that of me.....”

Davis contended that the resolve was vague and it was laid on the table and never taken up again. Even the “liberal” forces

which controlled the 1853 Convention were content to take it no further.

We are mindful that under New York law the value of a man's life indeed may well prove to be a "million of dollars" and that there are cases where great sums are awarded for wrongful death.

We do not recommend any change in the present statutes on wrongful death.

Certainly a change of this nature should come from the General Court if not from a Constitutional Convention, and only after long deliberation. When the 1853 Convention did consider it, one delegate referred to the "Achilles heel" of the Declaration of Rights and said:—

"The legislature have had their attention directed to this matter, but they have gone on, year after year, neglecting it, and we have no more protection than when it was first put into the Constitution in 1789."

The legislature has not neglected this area lately but has, however, refused to change the "penal" concept to a "pecuniary loss" concept.



VII. SPECIAL STUDIES

I. CABLE TELEVISION

HOUSE . . . (1968) . . . No. 4837

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AN ACT PERMITTING CITIES AND TOWNS TO AUTHORIZE THE INSTALLATION AND OPERATION OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND FOR THE REGULATION THEREOF.

1       Whereas, The deferred operation of this act would tend to  
2       defeat its purpose, which is to provide for immediate guide-  
3       lines for cities and towns as to their authority to grant  
4       permits for the installation and operation of community  
5       antenna television systems and for the regulation thereof.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       Chapter 166 of the General Laws is hereby amended by  
2       adding after section 43 the following sections:—  
3       Section 44. The following terms shall, in sections 45  
4       through 57 have the following meanings, unless the context  
5       otherwise requires:—

6       (a) “Commission”, the commission supervising and con-  
7       trolling the department of public utilities under chapter  
8       twenty-five.

9       (b) “Person” shall include a natural person and every form  
10      of organization incorporated or unincorporated.

11      (c) “Community antenna television system” or “CATV  
12      system”, a facility which receives and amplifies the signals  
13      broadcast by one or more television stations and redistributes  
14      such signals to subscribing members of the public for a fixed  
15      or periodic fee, employing wires or cables passing along, over,  
16      under, across and upon streets, ways, lanes, alleys, parkways,  
17      bridges, highways and other public places, including property  
18      over which a community has an easement or right-of-way; it  
19      includes facilities which in addition to providing such recep-  
20      tion, amplification and redistribution, are also used to origi-  
21      nate and distribute program material to such subscribers.

22      (d) “CATV operator” or “operator”, a person operating  
23      CATV system.

(e) "Issuing authority", a city council, board of aldermen or board of selectmen that has been authorized by a city or town to issue permits under section 46.

(f) "Assign" or "assignment" shall include any transfer, except by death, of direct or indirect interests in a permit or permittee totalling ten percent or more accomplished within any twelve month period or which would result in a transfer of control of such permit or permittee.

*Section 45.* No person shall construct, commence construction or operate a CATV system in any city or town by means of wires and cables of its own or of any other person, without first obtaining as herein provided a written permit from each city or town in which such wires or cables are installed or are to be installed. Such permit may by its terms be exclusive or nonexclusive as the issuing authority may determine. Each such permit shall contain the following provisions:

(a) The area or areas to be served;

(b) The completion date of the installation of all equipment, wires and cables necessary to serve the named area or areas;

(c) The date service shall be available to the named area or areas;

(d) The maximum rates to be charged to subscribers; and

(e) The term of the permit, which shall not exceed ten years.

*Section 46.* No such permit or renewal of permit shall be issued except upon written application therefor to the appropriate issuing authority on an application form to be prescribed by the commission. Such form shall set forth such facts as the commission may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the system, and complete information as to its principals and ultimate beneficial owners (including in the case of corporation, all stockholders both nominal and beneficial, and in the case of unincorporated associations, all members and ultimate beneficial owners, however designated) and such other information as the commission may deem appropriate or necessary. Such application shall be signed by the applicant or by a duly authorized person evidence of whose authority shall be submitted with the application. Each applicant shall make full disclosure as to the true ownership of the applicant and of the equipment to be employed in rendering service and as to the source of funds for the purchase, lease, rental and installation of such equipment. Each application shall set forth the equipment to be employed, the routes of the wires and cables, the area or areas to be served, the commencement and completion dates of construction of the system and the date

74 service will be actually available to the areas named. Addi-  
75 tional areas to be served may be added to the permit from  
76 time to time by subsequent supplementary applications or  
77 after hearing by direction of the issuing authority.

78 *Section 47.* Such form shall also require that in the event a  
79 permit is issued, the applicant agrees to the following:

80 (a) In installing, operating and maintaining equipment,  
81 cables and wires, it will avoid all unnecessary damage and  
82 injury to any or all trees, structures and improvements in and  
83 along the routes authorized by the issuing authority.

84 (b) It will indemnify and hold the city or town harmless at  
85 all times during the term of the permit from any and all  
86 claims for injury and damage to persons or property, both  
87 real and personal, caused by the installation, operation or  
88 maintenance of any structure, equipment, wire or cable  
89 authorized to be installed pursuant to the permit. Upon  
90 receipt of notice in writing from the issuing authority it will  
91 at its own expense defend any action or proceeding against  
92 the city or town in which it is claimed that personal injury or  
93 property damage was caused by activities of the permittee in  
94 the installation, operation or maintenance of its system.

95 (c) It will carry insurance in a form and in companies  
96 satisfactory to the issuing authority insuring the city or town  
97 and itself from and against any and all claims for injury or  
98 damage to persons or property, both real and personal,  
99 caused by the construction, installation, operation or main-  
100 tenance of any structure, equipment, wires or cables autho-  
101 rized or used pursuant to the permit; the amount of such  
102 insurance against liability for damage to property shall be  
103 not less than one hundred thousand dollars as to any one  
104 person and two hundred thousand dollars as to any one  
105 accident and against liability for injury or death to persons  
106 not less than one hundred thousand dollars as to any one  
107 person and three hundred thousand dollars as to any one  
108 accident.

109 (d) It will not engage directly or indirectly in the business  
110 of selling or repairing television or radio sets.

111 (e) It will provide cable drops and its service within the  
112 areas authorized by the permit at no cost to public schools,  
113 police and fire stations, public libraries and any other public  
114 buildings at any time designated in writing by the issuing  
115 authority.

116 (f) Upon termination of the period of the permit or of any  
117 renewal thereof by passage of time or otherwise, it will  
118 remove its supporting structures, poles, transmission and dis-  
119 tribution systems and other appurtenances from the streets,  
120 ways, lanes, alleys, parkways, bridges, highways and other  
121 public places in, over, under or along which they are installed  
122 and will restore the areas to their original condition; if such  
123 removal is not completed within six months of such termina-

tion, the issuing authority may deem any property not removed as having been abandoned.

(g) Whenever it may take up or disturb any pavement, sidewalk or other improvement of any public way or public place, the same shall be replaced and the surface restored in as good condition as before entry as soon as practicable. If the permittee fails to make such restoration within a reasonable time, the community may fix a reasonable time for such restoration and repair to be made by written notice to the permittee and upon the failure of the permittee to comply with the schedule specified, the community may cause proper restoration to be made and the expense of such work shall be paid by the permittee upon demand by the community.

(h) It will not remove any television antenna of any subscriber or proposed subscriber and in the event a subscriber already has an antenna installed, it will at no extra charge offer to him and maintain an adequate switching device to allow the subscriber to choose between cable and non-cable reception, unless the subscriber affirmatively indicates in writing that he does not desire such device.

(i) Whenever it transposes any television signal from the channel on which it was originally broadcast so that it is received on a different channel on the receiving sets of subscribers, it will at least monthly call the attention of subscribers in writing to such transposition and at least annually provide them with a sticker suitable for mounting on television receivers indicating the fact of such transposition.

(j) If it permits any person who is a legally qualified candidate for any public office to employ the facilities of its system to originate and disseminate political campaign material, it will afford equal opportunities to all other such candidates for that office to use such facilities on the same terms. If it permits its facilities to be used to originate and disseminate any views concerning a controversial issue of public importance, it will afford reasonable opportunity for the presentation over its facilities for the presentation of contrasting points of view. In the construction and application of the provisions of this subsection (j), decisions and opinions of the Federal Communications Commission under similar provisions of the Communications Act of 1934, as amended, and of policies established by the Federal Communications Commission pursuant to the Act, may be used as guide lines.

(k) Before commencing construction or in the event construction has been commenced or completed prior to the effective date of this section, within thirty days of such effective date, it will submit to the issuing authority a bond, with corporate surety satisfactory to such authority, in a penal amount set by such authority, based on the cost of the system, the condition of which shall be:



(1) the satisfactory completion of installation and operation of the system in accordance with the schedule proposed in the application and in accordance with subsection (a) of this section forty-seven;

(2) the indemnity of the city or town in accordance with subsection (b) of this section forty-seven;

(3) the satisfactory removal of its system in accordance with subsection (f) of this section forty-seven; and

(4) the satisfactory restoration of pavements, sidewalks and other improvements in accordance with subsection (g) of this section forty-seven.

(l) In the event its service to any subscriber is interrupted, it will grant such subscriber a pro rata credit or rebate.

*Section 48.* No application under section forty-six shall be granted except after a public hearing. Public notice of the filing of each application and of a hearing date within not less than thirty days of the filing of the first such application, shall be given in a newspaper of local circulation by at least two advertisements not less than a week apart placed and paid for by the applicant after advance approval of the form of such advertisements by the issuing authority. In no case shall any application be acted upon by an issuing authority within thirty days of the first of such advertisements. In the event more than one application is filed in any city or town, the issuing authority shall choose that applicant or those applicants which in its opinion will best serve the public interest. The issuing authority shall issue a public statement in writing containing the reasons for its decision. Any hearing required by this section may be consolidated with any hearing held pursuant to section twenty-two of this chapter.

*Section 49.* Each permittee shall install its CATV system and maintain the quality of the signals transmitted over its system to its subscribers in accordance with standards to be prescribed by the commission. Each such permittee shall also file annually with the commission and with the issuing authority on forms to be prescribed by the commission a statement of its revenues and expenses and its ownership. Such completed forms shall be kept in a file open to the public.

*Section 50.* No application for a permit to operate a CATV system or for renewal or assignment of such a permit shall be considered by an issuing authority unless it is accompanied by an application fee of five hundred dollars payable to the city or town. No permit shall be issued hereunder until the proposed permittee has turned over to the issuing authority a fee of one thousand dollars payable to the Commonwealth of Massachusetts. Similar fees shall be paid annually on or before the anniversary date of the permit during its life. No additional application or permit fees shall be required of applicants or permittees hereunder but they shall be liable for

all other ordinary and usual applicable business, franchise, property, income and other taxes.

*Section 51.* At any time after the expiration of three years from the effective date of sections forty-four through fifty-seven, the commission shall have authority, after appropriate hearing, to determine the propriety of the rates to be charged to subscribers by any CATV system and to issue an appropriate order which shall be binding on the CATV operator and the issuing authority.

*Section 52.* Complaints by any person as to the operation of any CATV system may be filed in writing with the commission or with the issuing authority, each of which shall within ten days forward copies of such complaints to the other. Any permit issued hereunder may after hearing be revoked by the issuing authority on any of the following grounds:

(a) For false or misleading statements in, or material omissions from, any application submitted under sections forty-six or fifty-three or any annual return under section forty nine;

(b) For failure to file and maintain a bond under section forty-seven (k) or to maintain insurance under section forty-seven (d);

(c) For repeated violation, as determined by the commission, of commitments of a permittee under section forty-seven (j);

(d) For repeated failure, as determined by the commission, to maintain signal quality under the standards provided for in section forty-nine;

(e) For any assignment without consent in violation of section fifty-three;

(f) For repeated violations of other obligations of the permittee under section forty-seven except for subsection (j) or of the terms of its permit.

The determinations of the commission provided for in subsections (c) and (d) may be delegated by it to its staff but such determination shall be transmitted to an issuing authority by the commission.

*Section 53.* Any permit issued hereunder may be renewed by the issuing authority for additional periods each not to exceed ten years. No initial or renewed permit may be assigned without the prior written consent of the issuing authority. Such consent shall be given only upon a written application therefor on forms to be prescribed by the commission. Such forms shall set forth such facts as the commission may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the proposed assignee to operate the system, and complete information as to its principals and ultimate beneficial owners (including in the case of corporations, all stockholders both nominal and

beneficial and in the case of unincorporated associations, all members and ultimate beneficial owners however designated) it being the intention hereof that each assignee shall make full disclosure as to its true ownership and as to the source of the funds to be used for the purchase and operation of the system. The application for consent shall contain such other information concerning the consideration to be paid and other matters as the commission may deem appropriate or necessary and shall be signed by the applicant and by the proposed assignee or by persons duly authorized, evidence of whose authority shall be submitted with the application. In no case shall the consent of an issuing authority to an assignment be given when it appears from the application or from subsequent investigation or otherwise that the consideration being paid in the proposed transaction includes a substantial payment for the permit issued hereunder.

*Section 54.* Sections forty-four through fifty-three hereof shall to the fullest extent legally possible apply to all CATV systems authorized or constructed prior to the effective date hereof. In any case in which prior to such effective date arrangements have been entered into between a city or town and an operator by means of contract, ordinance, by-law or otherwise which are inconsistent with the provisions of sections forty-four through fifty-three, the issuing authority shall take steps promptly and in any event within ninety days to insure compliance with such provisions.

*Section 55.* The commission may issue such regulations as it deems appropriate to carry out the purposes of sections forty-four through fifty-four. The commission shall have the authority to mediate between cities and towns and after appropriate notice and hearing to make a final decision, in the event of conflict in the exercise of jurisdiction to authorize or regulate CATV systems. The commission shall from time to time investigate whether the provisions of sections forty-five through fifty-four and the agreements required by section forty-seven are being complied with and any cases of noncompliance shall be reported by it to the issuing authority. The commission shall make a report annually to the general court on all of its activities pursuant to such sections and on such investigations.

*Section 56.* Nothing in sections forty-four through fifty-five shall be construed to bar operation of a CATV system by any city or town which pursuant to section thirty-four of chapter one hundred and sixty-four is engaged in the business of distributing electricity but such operation shall be subject to such sections forty-four through fifty-five as if the system were privately owned and operated.

*Section 57.* If any provision of sections forty-four through fifty-six or the application thereof to any person or circumstance is held invalid, the remainder of such sections and the

324 application of such provision to other persons or circum-  
325 stances shall not be affected thereby. No hearing provided for  
326 in or required by any such section shall be subject to chapter  
327 thirty A but all such hearings shall be publicly held after  
328 appropriate notice.

Community Antenna Television (CATV) systems receive broadcast signals from VHF television channels 2-13, and from UHF television channels above channel 13. These broadcast signals are received at a tower and antenna located reasonably near to the community served. From the antenna, the signals are amplified as they are carried by cable to an installation which is known as a "Head End" which is located in the community to be served. It is possible to locate the antenna at some distance and relay signals by microwave but we do not propose that our report should involve technical considerations in the field of electronic science.

At the Head-End the ultra high frequency signals are converted so that they can be used on channels 2-13 in the customer's home. The Head-End also serves as the control signal quality. Interference and other technical problems which prevent good television reception are corrected here; and it is from the Head-End that the television programs are distributed to the local community over a cable with "drop lines" leading off to the individual T-V set in the home or other location.

As CATV is capable of carrying many many channels not usually received in a particular location. Subscribers in some communities served by cable television may even have a greater selection of programs than those who are located in a metropolitan area not served by cable television.

### **New Local Programming Opportunities**

In addition to the reception of signals from a distance, it is readily possible to consider CATV as a completely new medium of communication. Local programs of interest mainly to those in a single community, or in a small area, can be carried over cables from the point of program origin. In this way, the town meeting or other activity of local government can be made available to the community. School and civic programs present unlimited prospect.



While local programming is highly beneficial to the community, there is little real profit in such activities on the part of the CATV company. It becomes immediately apparent that educational, cultural, political, and other programs are desirable in the public interest. Only recently a Massachusetts Educational Communications Commission was appointed to begin work leading to the establishment of a state-wide educational television network. As this plan will benefit all our citizens, it is in their interest that the Commonwealth reserve rights for economical educational purposes.

Law enforcement authorities and protective departments can make wide use of cable television and we think that rising tax rates suggest that such use be possible at the least cost to the community, or at no cost.

Political activity and discussions of public questions are to be encouraged always. It is now inescapable that something must be done to make such discussions possible without the tremendous costs involved; and there must be an assurance of fairness at all times.

There is a substantial area for local commercial use of cable television but we do not wish to dwell on this in our report.

Those who operate cable television systems as a business for profit will not be overly anxious to incur expense for local public service programming, or to allocate part of their facilities for public use, unless legislative standards are set up for their guidance. It would not do to ask some system operators to observe guide lines which were not imposed on all.

### **The Cost of CATV**

We are advised that the installation fee for cable television ranges between \$15.00 and \$25.00 per location. The monthly rate for the subscriber ranges from \$4.50 to \$7.50. It is customary for the CATV company to remove the existing antenna from a home at the time the cable connection is made. In areas where substantial antennae are needed, the replacement cost is often equal to the subscription cost for a year or two. This situation has had a tendency to prevent even dis-satisfied subscribers from discontinuing the service. It is customary to avoid the use of

written contracts, and there is no assurance that current monthly costs will not rise.

### **Problems of the New Medium**

There are a number of problems facing the CATV industry and the communities in which the medium seeks to operate. Some of the more notable are as follows:—

1. CATV must make use of the public streets and ways in order to run the cable throughout the community. The poles of the telephone company or utility company can be used for running the cable. It is in the public interest to require that service by the CATV company be given to all who wish to subscribe. Necessarily there should be but one (1) CATV cable in any given community to avoid senseless duplication of service and a plethora of wires and cables. Because the nature of the system does not admit of competition, the operator can not be permitted to choose where he will give service; he must offer CATV to all. It is in the public interest to see to it that care is taken in the construction and maintenance of the system. Unreasonable delay in making repairs deprives the public of the television media.
2. CATV must recognize an obligation to the public and the community which is served. It is reasonable, in return for a grant of the right to use public property, (streets) that the operator grant facilities for public use at no cost. Communities should not sell their CATV rights for a bouquet of promises.
3. CATV must provide quality television reception at all times. The basic reason for the existence of cable television has always been to provide, for a price, that which the television owner can not obtain because of technical inadequacies of broadcasting to distant places, or at places where reception is bad for some reason other than distance. It is in the public interest that the quality be kept high so that the subscriber gets what he is paying for.
4. CATV should not be permitted to disrupt the orderly system of broadcasting market areas served by licensed television broadcasting stations regulated by the Federal Communications Commission. The "cable-cast" of distant stations in competition with local commercial television stations is often undesirable. The F.C.C. has already dealt with this problem. (Sec. 47 C.F.R. S. 74.1107 to 1109.)

As this matter is strictly regulated by the F.C.C., there would be no need for the commonwealth to deal directly with it. It is necessary, we think, to be sure that if a CATV program is brought to a subscriber by cable, the subscriber should be able to determine the channel from which the program was originally broadcast.

5. If CATV is to be used for political activity by those seeking election to office, or to achieve some political end, we think that the public interest requires regulation in the interests of fairness to all of the various interests involved.

6. CATV, like other media such as newspapers, magazines, radio stations, television stations etc., should be required to disclose the identity of those who own and control the medium. This rule is now so inflexibly established in the United States that its application to cable television is unquestionably an absolute necessity. In the case of businesses such as CATV which are so intimately connected with the public interest, there must be a complete and full disclosure of everything connected with the financing and management of the enterprise. Anything less would be intolerable.
7. As towns now reserve space (at no cost) in underground telephone conduits, so might they reserve rights to use CATV cable (at no cost) for local and statewide public service programs.

## **CATV MUST BE REGULATED IN THE PUBLIC INTEREST**

Because of the conflict between the profit potential on the one side, and the obvious obligation to the public on the other, it is necessary to regulate cable television so that the public interest will not be further impaired. At the present time, there is no regulation of CATV by the Commonwealth.

### **The Confusing Industry Position**

It has been asserted by the industry spokesman — The National Cable Television Association, 1634 Eye Street, N.W., Washington, D.C. 20006 — in a brochure entitled “The CATV Industry & Regulation” published late in 1968:—

#### **Industry    Proposition No. 1**

“The service of CATV is primarily made up of the distribution of interstate television signals to subscribers. Its relationship to television and radio is such that the states cannot make regulations affecting this service because:

‘We think it is clear that Congress has occupied fully the field of television regulation, and that the field is no longer open to the states. Congress possessing the constitutional authority to effect the result’

if there was ever any doubt in this area, it was completely foreclosed by the Supreme Court on June 19, 1968, when it decided that “national regulation” is not only appropriate but essential to the efficient use of radio facilities.”

The industry publication cites *Allen B. Dumont Laboratories Inc. v. Carroll*, 184 F. 2d 153 (CCA-3 1950 - Cert. denied 340

U.S. 490) and the 1968 U.S. Supreme Court decision in *U.S. v. Southwestern Cable Co.*\_\_\_\_U.S.\_\_\_\_88 S.Ct. 1994 (1968) as authority for its pronouncement that the states do not have the right to regulate cable television.

### **Industry Proposition No. 2**

This position is not a new one for the industry. At a meeting held by the Massachusetts Consumer's Council in 1968, Mr. Richard Surprenant of the National Teline Corporation stated:

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"There is bound to be a lack of proper regard for many of the older niceties and services that consumers have come to expect from more mature businesses...." (Transcript p. 104)

"Several bills have been filed in the legislature of Massachusetts. None of these have been enacted. You are also aware that the Massachusetts Attorney General has ruled, in effect, that cable television regulation has been preempted by federal authority and, in his opinion, was not a matter for state legislation."

(Transcript p. 107)

### **Industry Proposition No. 3**

On December 14, 1968, the Federal Communications Commission announced it would regulate only certain aspects of the industry and, according to the *Boston Globe*, December 14, 1968:—

"Frederick W. Ford, president of the National Cable Television Association, Inc., and a former F.C.C. member, issued a statement calling on the CATV industry 'to fight with every ounce of its strength and resources' to get Congress to take away the F.C.C.'s regulatory powers in the area."

### **Industry Proposition No. 4**

It is the position of the CATV industry, according to the trade association — The National Cable Television Association — previously mentioned in this report, that:

"CATV is closely related to the municipalities which it serves and, because if its physical requirements, reasonable municipal regulation of the use of city streets is appropriate. Ordinarily municipalities may, under inherent or statutory powers, impose regulation or surveillance of CATV commensurate with the burden which inures to the municipality by virtue of CATV operation.

Cities may impose reasonable use or permit taxes on CATV but 'the



license fee' which a municipality may exact is limited to an amount which will bear some reasonable relation to the additional burdens and expenses imposed on the city.

Traditionally, municipalities have established standards governing system construction, stringing of cable, and compliance with safety standards. 'The local community is best able to decide the need, value and quality of the CATV service it should have.'

### **Industry    Proposition No. 5**

At the Consumer's Council meeting, Mr. Herbert Hoffman, President of Cablevision Corporation of America, said:—

"After the industry, like the automobile, has had a chance to develop, then and only then will be the time to re-examine and to put restrictions where necessary."

(Transcript p. 172)

Mr. Hoffman said that "cities and towns are completely capable in determining proper signals and anything else."

(Transcript p. 173)

Promoters of CATV incline towards saying that a Massachusetts town may regulate that which the Commonwealth is forbidden to touch. It is a novel idea, at least.

### **The Industry Wishes to Avoid Regulation**

We think that the published statements of those we have mentioned are indicative of a desire on the part of the industry to avoid regulation entirely.

When appearing before representatives of state government, the CATV people proclaim that the F.C.C. has completely occupied the field; when the F.C.C. seeks to enact regulations, the spokesmen for CATV call for a "fight with every ounce" of strength. When the state would regulate, "Home Rule" is put forth like a Potemkin village.

We do not agree with the legal position taken by the CATV industry in the past year, and we think that the correct legal situation has not been presented in light of recent developments.

### **The Role of the Federal Communications Commission**

According to News Report No. 254 of the Federal Communi-

cations Commission dated December 13, 1968, which deals with "New CATV Rules Proposed by F.C.C.", the CATV industry must plan, except in the smallest cases, to originate local programs. Possible "Pay-TV" is under consideration but this announcement is extremely significant:—

"The Commission proposed to adopt rules applicable to CATV originations similar to the equal opportunities, fairness, and sponsorship identification requirements of the Communications Act. *It stated that remaining matters would be left to local authorities*, and stressed the importance of these authorities in protecting the public in such areas as rates to the public, the legal, financial and character qualifications of the CATV franchise applicant, the area to be served etc. In the absence of local consideration the Commission raised the question whether Federal consideration would be appropriate, and its authority to proceed in this area."

The 1968 U.S. Supreme Court decision, *U.S. v. Southwestern Cable Co. supra* did not, as has been suggested, foreclose the right of the states to regulate CATV. A finding was made that the F.C.C. has reasonably found that the achievement of widely dispersed radio and television service, and a fair, efficient and equitable distribution of service among the several states and communities, was "placed in jeopardy by the unregulated explosive growth of CATV." But the Supreme Court of the United States did not say that there was no role here for the states.

CATV is not licensed by the Federal Communications Commission and except in certain areas clearly involving interstate commerce, and not having to do with the conditions surrounding the franchising and construction of local CATV, it would appear that the F.C.C. has not acted, and has no immediate intentions to act. In any event, it does not appear that any of the suggested legislation is inconsistent with the positions taken by the F.C.C. up to the present.

### State and Local Regulation

The second industry proposition is to the effect that regulation of CATV is a matter only for the cities and towns. It was represented that our Massachusetts Attorney General, Edward M. Brooke, ruled that CATV had been reserved for federal regulation.

In an opinion dated May 25, 1966 relative to House (1966) No. 238 which would have placed CATV under the Massachu-

setts Department of Public Utilities, Attorney General Brooke seems to have viewed cable television as an adjunct of interstate television broadcast which was regulated by the F.C.C.

Mr. Brooke's opinion is clearly based on the premise that:—

“it was the intention of Congress to occupy the television broadcasting field in its entirety.....”

but we think that is now apparent that neither Congress nor the F.C.C. have indicated that there is a federal assumption of control over CATV in all of its aspects.

In October of 1967, for example, Rosel H. Hyde, Chairman of the F.C.C. made a statement that “matters of initial franchising or other authorization of systems, and the terms of franchising are left to local law and municipal bodies.” By “local” Mr. Hyde clearly meant state law rather than federal law, but we do not rule out the possibility that “local” ordinances may govern within a city or town. It was not until June of 1968 that the U.S. Supreme Court decided the *Southwestern Cable* case and only in December 1968 did the F.C.C. clearly indicate that many matters would be left to local and state government. None of these developments were anticipated when Mr. Brooke gave his opinion in early 1966.

Congress has not enacted a federal CATV law, and it remains to be decided that a television “Cablecast” which originates in one Massachusetts town, and is carried by cable only within the limits of that town, and no further, is the equivalent of engaging in interstate commerce. We note that there is a strong opposition to federal regulation and a determined effort underway to prevent it, and to prevent any federal legislation.

One necessity for local action arises from G.L. (Ter. Ed.) Chapter 166, Sections 21 and 25. Under these sections a CATV company may construct lines and facilities for cable television, and may use existing facilities, provided that the approval of the selectmen is obtained, and provided that the CATV company shall abide by regulations established for the erection and maintenance of these lines or cables. Such regulations shall be reasonable and may include a contractual arrangement under which public ways are used for CATV. It might be added that private property could not be used for stringing cable unless some arrangement was made with the owner.

As an example of the existing situation, we have annexed to this report a copy of the CATV license granted by the Selectmen of the Town of Ware to the Pioneer Valley Cablevision, Inc., and also a copy of the license granted by the Town of Amherst to the same company. A reading of these licenses will indicate a little of the great uncertainty that now exists in our cities and towns as to how this problem should be handled. The Amherst license is in reasonable detail but the town manager had noted an unsatisfactory situation in areas of the town where television reception was poor. The Amherst town manager suggests a system of control much the same as in the case of telephone and electric utilities.

### **State Regulation is Indicated**

It does not appear that the various cities and towns would have technical personnel available to supervise the quality and technical performance of CATV. This is especially true of the smaller communities where even now independent technicians service the municipal radio systems.

Referring once again to the problems which we determined to be existing in this new medium of communication, it is our opinion that the proper regulation of CATV can be done only by an agency or department of the state government. To have each community duplicate all of the activities of the others in the regulation of cable television simply does not make good sense, and would result in the wasteful expenditure of tax dollars which could be better used for another purpose. The industry is entitled to uniform regulations; it should not face unduly severe burdens in one area and virtually no restrictions in some other place.

To permit state regulation to be more effective, it is still very necessary to allow the selectmen and city officials to judge what regulations on the local level would best apply to the construction of the cable lines, and other facilities. Every city and town has developed considerable skill in handling telephone and utility line locations. Some have been able to have such lines run underground, and there is no reason why the state need concern itself with this aspect of the matter at all. If it becomes necessary



to have administrative control of all aspects at the state level, it can be a condition precedent to obtaining such authority, as may be needed, that the applicant first obtain the approval of the selectmen or city officials.

To assure fairness in local political campaigns conducted on cable television, it would seem better that a disinterested state agency act as umpire. The cat is not to be set to watch the cream.

### **RECOMMENDATION OF THE JUDICIAL COUNCIL**

We are in favor of the bill (House 4837 of 1968) which was sent to us for our consideration and report.

In this report we have included an analysis and comparison of House 4837 of 1968 and House No. 4897 of 1968. Both bills deal with the regulation of CATV and the comparison demonstrates the strength of House 4837, which also conforms to the philosophy of the F.C.C. so far as we can determine.

Another plan for similar legislation retains all of the essentials of the bill referred to us (House No. 4837) but in place of Section 44 (a) which would have placed CATV under the department of public utilities, it is to be suggested to the 1969 session of the General Court that a "CATV Commission" within the Department of Public Utilities, and subject to its control, be established. We do not wish to become perplexed by problems of administrative control and would assume that the proposed commission would do the same job as would be done by the necessary additional personnel otherwise designated. A "commission" with an exclusive assignment to regulate CATV would not be vexed with other problems, and would probably prove more effective for that reason.

We think that administrative arrangements are something which the General Court will be able to determine, but we recommend the enactment of a law in the form of House No. 4837 of 1968.

The different approach of these two towns is an indication of the need for a more uniform standard.

## **Town of Ware CATV License**

### **COMMONWEALTH OF MASSACHUSETTS**

HAMPSHIRE, ss

Town of Ware

Permission is hereby granted to PIONEER VALLEY CABLEVISION INC., a Massachusetts corporation with an usual place of business at Greenfield, Franklin County, Massachusetts, hereinafter called the Permittee, to erect or construct a line for the transmission of television signals within the Town limits of the Town of Ware, upon, along, under and across public ways of the said Town; said line to be attached to poles of the New England Telephone and Telegraph Co., and or the Massachusetts Electric Company, and/or upon poles to be erected by the Permittee, SUBJECT HOWEVER, to the said Permittee accepting and agreeing to the following terms and conditions, viz:

1. Said Permittee shall not incommode the public use of the public ways.
2. Said Permittee shall indemnify and save harmless the Town of Ware of and from all suits, claims, damages and injuries to persons or property arising out of the erection, construction, operation and maintenance of said line hereunder.
3. Said Permittee by the acceptance of this Permit hereby agrees not to engage directly or indirectly in the business of selling or servicing Television sets and/or equipment, parts, etc., within the said Town of Ware.
4. Said Permittee by acceptance of this Permit agrees to commence construction of the Central Antenna System or or before one year from date of issuance of this Permit.
5. This Permit is granted under and is intended as a compliance with M. G. L. A. Chapter 166 Sections 21 through 42, and acceptance by the Permittee required a full compliance with the above cited Statute; failure to comply therewith shall be grounds for revocation of this Permit.
6. The Permittee agrees not to increase their rates charged to customers without the approval of the Selectmen.
7. Failure on the part of the Permittee to comply with and carry out all the terms and conditions of this Permit shall be grounds for revocation of this Permit, after due notice and a hearing, according to law.

Granted: March 25th 1965

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**TOWN OF AMHERST  
CATV LICENSE  
LICENSE TO INSTALL AND MAINTAIN  
TELEVISION CABLE LINES**

This is to certify that the Board of Selectmen, the Licensing Authority in the Town of Amherst, acting pursuant to their authority under Chapter 166, Sections 21 and 25 of the General Laws of Massachusetts and all other laws and amendments thereto, has granted and does hereby issue to PIONEER VALLEY CABLEVISION, INC., 173 Main Street, Greenfield, Massachusetts, and its successors and assigns, a license to install and maintain cable lines within the incorporated limits of the Town of Amherst on existing poles owned by the New England Telephone and Telegraph Company and/or Western Massachusetts Electric Company and/or other poles to be erected by the Licensee for the purposes of installing, distributing, servicing and supplying television signals by means of a master or central antenna system directly to television receivers of those residents of the Town of Amherst who desire such service. The license hereby granted shall expire at the expiration of ten years from the date hereof.

This license is issued upon the following terms and conditions:

- I. Definitions:** For the purposes of this license, the following terms, phrases, words and derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory.
  - A. "Town" is the Town of Amherst, Massachusetts.
  - B. "Company" is PIONEER VALLEY CABLEVISION, INC.
  - C. "Board" is the Board of Selectmen, Amherst, Massachusetts
  - D. "Person" is any person, firm, partnership, association, corporation, company, or organization of any kind.
  - E. "System" shall mean the lines, fixtures, equipment, attachments, and all appurtenances thereto which are used in the construction, operation, and maintenance of the community antenna television system herein stated.
- II. Compliance with Laws, Regulations and By-Laws:** The construction, operation, and maintenance of the system by the Company shall be in full compliance with the National Electric Code as from time to time amended and revised, and in full compliance with all other applicable rules and regulations now in effect or hereinafter adopted by the Federal Communications Commission, The Town, the State of Massachusetts, and the United States Government.
- III. Conditions on Street Occupancy and System Construction**
  - A. **USE.** All transmission and distribution structures, lines, and equipment erected by the Company within the Town shall be so

located as to cause minimum interference with the proper use of streets, alleys, and other public ways and places and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of said streets, alleys or other public ways and places.

- B. **RESTORATION.** In case of any disturbance of pavement, sidewalks, driveways, or other surfacing, the Company shall, at its own expense and in a manner approved by the Town, replace and restore such places so disturbed in as good condition as before said work was commenced, and shall maintain the restoration in a condition approved by the Town for the full period of one year.
- C. **RELOCATION.** In the event that any time during the period of said Franchise the Town shall lawfully elect to alter or change the grade of any street, alley, or other public way the Company, upon reasonable notice by the Town, shall remove, re-lay, and relocate its equipment at its own expense.
- D. **PLACEMENT OF FIXTURES.** The Company shall not place any fixtures or equipment where the same will interfere with any gas, electric, telephone, fire alarm system or sewer and water lines, fixtures, and equipment, and the location by the Company of its lines and equipment shall be in such manner as to not interfere with the usual travel on said streets, alleys, and public ways and the use of the same by gas, electric, telephone, fire alarm system, and water and sewer lines and equipment.
- E. **TEMPORARY REMOVAL OF WIRES FOR BUILDING MOVING.** The Company shall, on the request of the Town temporarily raise or lower its wires to permit the moving of buildings.
- F. **NON-LIABILITY OF TOWN.** The Town shall not be liable for any damage occurring to the property of the Company caused by employees of the Town in the performance of their duties, nor shall the Town be held liable for the interruption of service by actions of Town employees in the performance of their duties, nor shall the Town be held liable for the failure of the Company to be able to perform normal services due to acts of God.
- G. **PERMITS, EASEMENTS, AND AGREEMENTS.** The Town shall not be required to assume any responsibility for the securing of any rights-of-way or easements, nor shall the Town be responsible for securing any permits or agreements with other persons or utilities.
- H. The Company must utilize, whenever practical, existing poles and /or conduits for its operation.
- I. The Board shall retain the right to grant permits for the erection, relocation or abandonment of all poles and underground conduits in the same manner as for electric and telephone utilities.



**IV. Indemnification and Liability** The Company shall indemnify and save harmless the Town of Amherst from any claim of any person for injuries to his person or property by reason of anything done or permitted to be done or suffered or omitted to be done by the Company in the operation of said lines including any liability that the Town may suffer by virtue of the failure of the Company to comply with the Workmens Compensation Law. The Company shall carry liability insurance to protect the Town and the Company from and against all claims, demands, actions, judgments, costs, expenses and liabilities which may arise or result, directly or indirectly from and by reason of such claims. The amounts of such liability insurance against bodily injury claims shall be an amount of Two Hundred Fifty Thousand (250,000) Dollars for each person and Five Hundred Thousand (500,000) Dollars for each accident; as to property damage liability insurance the Company shall carry limits of One Hundred Thousand (100,000) Dollars as to any one accident and Two Hundred Thousand (200,000) Dollars aggregate in any single policy year. The Company shall also carry such insurance as it deems necessary to protect it from all claims under the Workmens Compensation Laws in effect that may be applicable to the Company. All insurance required by this franchise shall be and remain in full force and effect for the entire life of this franchise. Said policy or policies of insurance or a certified copy or copies thereof shall be approved by the Board of Selectmen of the Town and then deposited with and kept on file by the Town of Amherst. In addition, the Company shall indemnify the Town and its officials and shall hold them and each of them harmless of and from any and all liability with respect to alleged copyright infringements.

**V. PROHIBITIONS:**

- A. The Company, any and all of its officers, agents, and employees, are specifically prohibited from engaging in the sale, service, rental, or leasing of television receivers, radio receivers, or television or radio receiver related parts and accessories with any person, anywhere in the Town whether for a fee or charge or not. The Company shall prohibit any of its officers, agents, and employees from violating the terms of this section at all times, whether in the performance of duties of the Company or otherwise.
- B. The Company shall not engage in the business of PAY TELEVISION, that is, the sale of programs on a program by program basis.
- C. The Company shall not contract for or otherwise provide a music service which is originated by the system or procured from any source other than from signals broadcasted by duly authorized broadcasting stations to any business, professional or commercial establishment.
- D. The Company shall not use the system for advertising or political purposes for itself or others, nor shall the Company transmit

over any of its equipment any commercial information, advertising or political material except that which is received from a regular broadcasting station and merely relayed to the subscribers in the same manner as is received from such broadcasting station with its normal program.

- E. The Company, any and all of its officers, agents, and employees shall not indicate and shall not recommend, in any manner a specific sale or service establishment or individual be used for the sale or service of any television set.
- F. The Company shall provide community antenna television service without installation or monthly service charge to all public, private, and parochial schools, the Libraries, Town-owned recreational buildings, Town Hall, Police Station and Fire Station, providing such installations are within the Town limits, and provided further request therefor in each case shall be made by the licensing authority. (Schools limited to elementary and secondary level).
- G. The Company shall reserve a television channel for the use of educational institutions within the Town limits for the origination of educational television telecasts and the interconnection of all said educational institutions.
- H. Installation shall be maintained so as not to interfere with television reception already in existence.

#### **VI. Performance Requirements:**

- A. The System to be maintained under the terms of this license shall have a twelve channel capacity and will, in addition to commercial channels, have at least one educational channel and one channel for locally originated educational programs as provided in Paragraph V - G. above. Selection of the remaining commercial channels shall be in conformity with the rules and regulations of the Federal Communication Commission relative to non-duplication of network programs broadcast by local television stations and shall be selected upon the basis of public demand, quality of reception, and availability of channels. It is specifically understood that Channel 2 (WGBA Boston) shall be carried so long as it shall be available and unrestricted.
- B. In areas or locations served by the Company where underground construction of telephone and electric service is in use or shall hereafter be installed, the Company shall install its system in the same manner willingly and without objection.
- C. The Company shall exercise every reasonable effort to install the newest developments in equipment and to install equipment which will tend to minimize possible objectionable appearance with particular reference to on-line amplifiers.
- D. Physical construction of the System shall commence as soon as pole attachment arrangements have been made with the utilities, but in no event later than six months from the date of issuance of this License. The original construction shall service

at least 85 per cent of the resident population of the Town of Amherst as determined by the State Census, exclusive of students, and shall be completed within eighteen months of the issue of this License.

- E. The equipment to be installed within the Town is more particularly described on the schedule hereto attached, marked "A".
- F. The Licensee has furnished to the Town this date a bond, a copy of which is attached hereto. Upon the completion within eighteen months of this date of the original construction servicing at least 85 per cent of the resident population of the Town, exclusive of students, as provided in Sub-paragraph D, above, no further bonding shall be required.

**VII. The rates to be charged to the Company's subscribers are shown on the attached schedule marked "B".**

**"A"**

**EQUIPMENT, LOCATION,  
SPECIFICATIONS AND DESCRIPTION**

**A. Antennas**

We propose to use multistacked 5 or more element yagi antennas for each VHF channel, arrays to be designed for maximum pickup of desired signal and rejection of interference. 4 foot parabolic antennas will be used for UHF stations received. 5 element yagi antennas will be used for FM reception.

**Electronic Equipment**

**B. Head End**

We propose to use one Jerrold channel commander model COM for each TV channel. Automatic frequency control, automatic gain control and stable tuning circuits built into these units maintain fixed output signal levels with input signal variations of 300-1. This type equipment necessary of adjacent channel operation in a 12 channel system. Each UHF signal will be converted to VHF channel using a Jerrold model 503 crystal controlled UHF converter. One Sherwood model S 3000 FM tuner will be used for each FM station carried. These tuners incorporate ultra stable tuning, automatic gain control and wide band circuitry. Used in conjunction with a Jerrold model AFM-2 crystal controlled modulator to insure a full fidelity FM radio reception.

**C. Amplification Equipment**

Approx. 10 trunk bridging amplifiers with automatic gain control, Jerrold SA-1 or equivalent. Trunk amplifier gain 26 D.B. Bridging amplifier gain 18 D.B. Automatic gain control  $\frac{1}{2}$  D.B. output variation for 4 D.B. input variation. Used at every third trunk amplifier location, these units restore the signal strength lost through approx. 1200' of JT 1500 cable. The AGC feature compensates for cable loss

variations due to temperature changes. These and all other amplifiers used in the system are strand mounted (on line amplification). Feeder amplifier provides signal for up to four feeder lines. Approx. 30' trunk bridging amplifiers Jerrold model SA-2 or equivalent. Trunk amplifier gain 26 D.B. Feeder amplifier gain, 18 D.B. similar to SA-1 except no automatic gain control. Spaced 1250'-1500' throughout the system.

#### **D. Line Extender Amplifiers**

Approx. 40 line extender amplifiers Jerrold model 8X-1, 24 D.B. gain, provide additional gain required for long feeder lines.

#### **F. Time-Weather Channel**

Equipment manufactured by Telemation Inc. a television camera GE model 4TE 20A1 scans automatic instruments indicating time, temperature, barometric pressure, wind speed, wind direction and rainfall. 2 card slots are available for local public service announcements. Video signals from camera are mixed with audio from an FM radio station using modulator Jerrold modulator number TM-13.

#### **G. Messenger Cable**

Approx. 175,000'  $\frac{1}{4}$ " outer diameter high strength (4750 LD Test) steel messenger strand used to support coaxial cables attached to utility poles throughout the town.

#### **H. Trunk Cable (A.)**

Approx. 10,000' (JT 1750)  $\frac{1}{4}$ " aluminum jacketed coaxial cable. Inner conductor-.146". Outer conductor-wall thickness .037". Attenuation measured at Channel 13 DB/100' 70°F used as trunk cable to distribute signals throughout the town.

#### **I. Trunk Cable (B.)**

Approx. 25,000 (JT 1500)  $\frac{1}{4}$ " aluminum jacketed coaxial cable. Inner conductor .098". Outer conductor wall thickness .025". Attenuation measured at Channel 13 DB/100' 70°F **used as trunk cable to distribute signals throughout the town.**

#### **J. Feeder Cable**

Approx. 165,000 JT 1412 .412 aluminum jacketed coaxial cable. Inner conductor .078". Outer conductor wall thickness .025". Attenuation measured at Channel 13 DB/100' 70°F.

#### **K. Lashing Wire**

Approx. 200,00' .045 stainless steel lashing wire used to lash coaxial cables to messenger strand.

#### **L. House Connection Material**

All connections made with Jerrold HFD 1491A or equivalent pressure taps and RG 59/U cable. Number 22 center conductor . . 245" outer conductor will be used to connect home subscribers. A Jerrold model T378 or equivalent transferred will be used to connect TV set to cable. Jerrold model 1492 or equivalent splitters will be used to connect additional sets within the homes. Jerrold FM-2 or equivalent FM splitters will be used to connect FM radios.



**“B”**

Basic installation charge	19.95
Monthly service charge	4.95
Installation for additional set	5.00
Monthly service charge additional set	1.00
FM installation charge	9.95
Service charge for FM — added service to subscriber	none
Non-subscriber moving into residence where wiring already in — connection charge	7.50
Subscriber moving to new residence — connection charge	5.00
Temporary disconnection — No charge for disconnection.	
No service charge during disconnection.	
Reconnection charge	3.50
Relocate outlet in subscriber's home — Charge only for time and any additional material required.	

**COMPARISON OF PROVISIONS OF CONSUMERS' COUNCIL  
CATV BILL (HOUSE NO. 4837) AND HOUSE NO. 4897 PASSED  
BY THE HOUSE OF REPRESENTATIVES ON JULY 12, 1968**

**CONSUMERS' COUNCIL BILL****HOUSE NO. 4837****HOUSE NO. 4897****Initial Authorization and Restriction on Operations**

- |   |  |
|---|--|
| <p>1. Would authorize city councils, boards of aldermen and boards of selectmen to issue permits to operate CATV systems (Sec. 46), such permits to be subject to the following legislative guide lines:</p> <p>(a) Term of permit not to exceed ten years but subject to renewal for additional periods of ten years (Sec. 45 and 53).</p> <p>(b) Application form to be prescribed by the DPU and to contain facts as to citizenship, character and financial, technical and other qualifications of the applicant to</p> | <p>1. Would require written application for a written permit to be submitted to each city or town in which a CATV system is installed or is to be installed (Sec. 46) but:</p> <p>(a) No limitation on term of permit;</p> <p>(b) No specification of information required to be contained in application form, no requirement of full disclosure of the true owners of each CATV system and no limitation on transfer or assignment of permits;</p> |
|---|--|

- operate the system and complete information as to its true owners (Sec. 46). Restrictions on assignment of permits and on transfer of interests in permits, enabling issuing authority to control future holders and the prices at which such permits may be sold (Sec. 44 (f) and 53).
- (c) Restriction on CATV operator's engaging in the business of selling or repairing television or radio sets (Sec. 47 (d) ).
  - (d) Restriction on removal of television antennas of subscribers and requirement for installation of an adequate switching device to allow subscribers to choose between cable and non-cable reception (Sec. 47 (h) ).
  - (e) Requirement that a surety company bond be supplied to protect the municipality and the general public (Sec. 47 (k) ).
- (c) No restriction on CATV operators' engaging in the sale or repair of television and radio sets;
  - (d) No restriction on removal of television antennas or requirement of switching devices; and
  - (e) No requirement for surety company bond.

## HOUSE NO. 4897

### Rate Regulation

2.

- (a) Each permittee required to file annually with the DPU and the municipality a statement of its revenues and expenses and its true ownership; such completed forms to be open to the public (Sec. 49).
- (b) After a moratorium of three years, the DPU would have authority after appropriate hearing to determine the propriety of CATV rates charged to subscribers and to issue appropriate orders binding on CATV operators and the issuing authority (Sec. 50).

2.

- (a) No requirement for periodic reports of revenues, expenses and ownership.
- (b) Provision is made for restrictions on increases of "either installation charges or rates without the prior approval of the issuing authority" (Sec. 52) but there is no provision for possible reductions in rates based on actual experience. Provision is made for setting up a new five-member advisory board composed of two representatives from the cable television industry to be ap-

pointed by the governor, the chairman and one other member of the DPU and the Commissioner of Public Safety or his designee (Sec. 44); such board authorized to serve only as an advisor to issuing authorities on technical matters.

### **Investigation and Regulation of CATV Operations**

3. DPU would be given authority to issue appropriate regulations to carry out the purposes of the statute, to investigate whether its provisions were being complied with and in cases of non-compliance to report the facts to the issuing authority; requirement for an annual report to the General Court on all such activities (Sec. 55). Power in the issuing authority to revoke permits in some cases because of facts determined by the issuing authority and for violations of the statute as determined by the DPU (Sec. 52).

Power in the issuing authority to revoke permits but only after compliance with the stringent administrative provisions of G. L. Ch. 30A (Sec. 53), and no provision for investigative assistance from any state agency to establish the facts on which a determination of revocation might be based.

### **Grandfather Rights**

4. Bill expressly applies to the fullest extent legally possible to all CATV systems authorized or constructed prior to the effective date of the statute.

4. CATV companies and systems already authorized, in the process of construction or in operation prior to the effective date of the statute exempted from the requirement of obtaining a written permit, the requirement of filing a written application for a permit, the requirement of public notice of an application and a hearing (Sec. 55); they are also exempted in perpetuity from paying any application or permit fees (Sec. 55 but such fees must be paid by all newcomers entering the business after the effective date of the

statute (Sec. 51). The exemption provisions of the Bill (Sec. 55) are so sweeping as to raise questions whether existing systems may no longer be subject to existing statutes now concededly applicable to their operations.

## **HOUSE NO. 4897**

### **Controversial or Political Broadcasts**

5. Provides would equal opportunities to all political candidates to use such facilities on the same terms: Affords reasonable opportunities for presentation of contrasting points of view. (sec. 47J) The enforcement of this section would be assigned to the Department of Public Utilities. (Sec. 55).

Would provide for the same general provision except enforcement rest with local issuing authority who may become involved in such a controversy as a party of interest.

### **Handling of Complaints from the Public**

6. Would provide for a procedure of filing of complaints by any person as to the operation of any CATV system. Both the issuing authority and the Department of Public Utilities would have the authority to act directly on such complaints. (Sec. 52) Revocation of a CATV permit would be provided for in six separate sections. (Sec. 52A-F)

Complaints by any person as to the operation of CATV system would be filed with the issuing authority or the CATV Board both of which would have to forward copies of such complaint to the CATV Company for handling. Revocation of a CATV permit limited to three areas.

### **Disputes Between Cities and Towns**

7. In the event of disputes between cities and towns concerning a CATV system, the Department of Public Utilities would have the authority to mediate.

Provides for no handling of such disputes even though most all systems will cover two or more cities and towns.



## II. SPECIAL STUDIES

ENFORCEMENT OF ZONING AND  
BUILDING LAWS

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HOUSE . . . (1968) . . . No. 2014

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## AN ACT TO LIMIT ENFORCEMENT OF GOVERNMENTAL LAWS AND REGULATIONS RESPECTING BUILDINGS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1        *Section 1.* Chapter 184 of the General Laws is hereby  
2        amended by adding after section 23A the following section:—

3        *Section 23B.* No action, suit or proceeding shall be main-  
4        tained either at law or in equity in any court, nor any admin-  
5        istrative or other action taken to recover damages or to compel  
6        the removal, alteration or relocation of any structure or part  
7        of a structure or alteration of a structure by reason of any  
8        violation of any law, by-law, ordinance, rule or regulation of  
9        the commonwealth or any body politic established within and  
10       by said commonwealth, regulating the construction, placing,  
11       relocation or alteration of structures or improvements with  
12       respect to the location of structures or improvements in re-  
13       lation to zoning districts, streets or lot boundaries, the area,  
14       frontage width or dimensions of the lot on which constructed,  
15       or the percentage of lot covered, at the time of construction or  
16       placement or with respect to materials used, type of structure,  
17       or its size, height or number of stories, or size, type or number  
18       of dwelling units, unless such action, suit or proceeding is com-  
19       menced and notice thereof recorded within six years next  
20       after the commencement of the alleged violation of law. Such  
21       notice shall include names of one or more of the owners of  
22       record, the name of the body politic initiating the action, ade-  
23       quate identification of the structure and the alleged violation,  
24       and shall be recorded in the registry of deeds for each county  
25       or district in which the land lies.

26       If any structure or other improvement protected by this  
27       act shall be destroyed to an extent not exceeding seventy-  
28       five per cent of its insurable value, it may be rebuilt substan-  
29       tially as prior to its destruction, and all necessary permits  
30       therefor shall be granted upon proper application.

31       For the purposes of this section, the record of assessment

32 of any structure or part or alteration thereof for taxation  
33 shall be prima facie evidence of the completion of such struc-  
34 ture or part or alteration thereof by the first day of January  
35 of the year of assessment.

36 This section shall not be construed as extinguishing, limit-  
37 ing or abridging any defense against any such action, suit  
38 or proceeding which would otherwise be available nor as  
39 affecting the right to enforce any law or regulation respecting  
40 the use or land or improvements or to enforce any law or  
41 regulation with respect to premises which, by reason of their  
42 condition, are dangerous to life, safety or health.

1 *Section 2.* Section twenty-three B of chapter one hundred  
2 and eighty-four of the General Laws, inserted by section one  
3 of this act shall apply to all alleged violations occurring before  
4 the effective date of this act, as well as to those made there-  
5 after, except that in the case of an alleged violation occurring  
6 prior to January first, nineteen hundred and sixty-three, any  
7 action, suit or proceeding to which reference is made in sec-  
8 tion one must be commenced and notice thereof recorded prior  
9 to January first, nineteen hundred and seventy.

This bill was supported by the Massachusetts Conveyancers Association as a measure to make it easier to transfer titles to real estate where there might be a legal question relative to compliance with the zoning or building laws or both. It is argued that because there is no time limit on the enforcement of building laws and regulations, and because there is no time limit on the enforcement of zoning by-laws and subdivision regulations, a buyer of real property may be required to buy at his peril. He may even be obliged to demolish the building, it is argued.

It is suggested that the buying and selling of a significant percentage of property will be made more easy if our cities and towns are prohibited from compelling compliance with the various building and zoning by-laws after six years has passed since the violation took place. The bill would go even further as to violations which had occurred over six years ago, prior to January 1, 1963, and prohibit any enforcement after January 1, 1970. Certain exceptions would exist. Structures which are dangerous to life, safety, or health would still be subject to applicable laws and enforcement could be applied.

This permissive statute seems to place a premium upon concealment of building and zoning violations especially at a time

when complaints arise on every hand that housing and other structures are inadequate. It would legalize every violation of law prior to January 1, 1963 except where it could be shown that the condition was "dangerous to life, safety or health." It is only in recent years that our municipalities have had adequate personnel to enforce the building and zoning laws, and many situations now exist of unknown violations which would never be permitted if authorities had knowledge.

We can not agree that a buyer is helpless to discover whether or not some property is constructed or being used in accordance with applicable law. We would observe that it does happen that a buyer does not always have 100% assurance in every case, but if he retains a skilled attorney experienced in the conveyancing practice, and obtains a certificate from a registered professional engineer on a plot plan, and if an investigation is made at the building department of the community where the structure is located, the chances for difficulty, while not eliminated altogether, are reduced to a small fraction.

The recent pattern of legislation in Chapter 184 of the General Laws is to protect land titles from cumbersome and obsolete burdens such as uncertain and obsolete restrictions (Section 25).

In Chapter 184 Section 23A it is provided that **private** actions for damages or to require removal, alteration, or other corrective action, in relation to buildings which violate **private** restrictions or conditions must be commenced within six years of the date of the construction which is in violation. This limitation on private enforcement applies to set backs, size, type, number of dwelling units, number of stories, porches, garages, driveways, fences, cost of construction, etc. The idea behind this legislation is that if no one cares enough to complain about a private violation within six years, it is best to let sleeping dogs lie.

It is one thing to establish a limitation of actions involving a small neighborhood. It is quite another to tie the hands of every city and town in the Commonwealth when they are striving mightily to keep existing structures under tight control. The community knows its own problems best, and Home Rule is to be fostered.

The bill is extremely broad in scope and we regret to conclude that it would cause havoc from Provincetown to Pittsfield

and at every point in between. We think that encouragement should be given to the restoration and rehabilitation of property, rather than to its preservation in a substandard condition.

We can not pre-determine what is dangerous to life, safety, or health. It occurs to us that to some degree at least any crowding of a residential structure, any use of shoddy or combustible materials, any failure to provide proper means of egress, any departure from sanitary codes, in fact almost any dereliction can be dangerous to safety and health, and possibly to life itself.

We can not recommend legislation on the basis it will make it easier to buy and sell real estate when the real purpose of our building and zoning by-laws will be defeated in the process.

The General Court should not lose sight of the fact that a person who finds that he has run afoul of some unforeseen complication may appeal to the municipal Board of Appeals for a variance or a special permit under Chapter 40A, Section 15 and 16 et seq. Upon a proper showing, it is normally possible for relief to be granted to a person who is not the actual creator of his own woe.

Possibly a simple matter such as a long existing violation of side-yard or rear-yard requirements could be legitimatized after the passage of time but we have rarely heard of any case where a Board of Appeal would not grant a variance in such a situation.

The proposed legislation serves only a limited purpose, and that badly. It is not in the interest of the Commonwealth to so restrict its municipalities in matters of this kind. Chapter 40A provides for an appeal to the Superior Court in cases where it is asserted that the Board of Appeal has acted other than in accordance with the law.

We do not intend to indicate that we would oppose some attempt to provide relief for inconsequential zoning law violations which have existed for decades. It is possibly more advisable, however, to leave such things to local solutions.

We do not recommend this bill.



## II. SPECIAL STUDIES

### III. CONSERVATION EASEMENTS OR RESTRICTIONS

#### Conservation Restrictions

In our 42nd Report for 1966 at pages 86-114 we discussed the matter of "Conservation Easements". The terminology has now been altered slightly by the conveyancing profession because of the fact that many lawyers and others seem to find it difficult to distinguish between an easement and a restriction in certain cases. This is especially true in easements for scenic views which are not restrictions at all.

The members of the Committee on the Judiciary, sitting as a Special Commission, made a report on this legislation (Senate No. 1205 of 1968) dated July 15, 1968 in which it was said:—

"The purpose of this act is to clarify property law as it pertains to restrictions held for public purposes and to provide a practical system by which these interests can be found by conveyancers. The act quiets title and insures that the public rights in land are protected. This legislation is necessary because neither the common law nor the 1961 Obsolete Restrictions Act recognized the particular problem presented in the case when a restriction is held for the benefit of the public. This act does not give any public agency any additional authority to acquire land it does not diminish the power of any public agency to acquire land for public purposes."

We would again give our endorsement to the idea of having a comprehensive plan for the protection of conservation restrictions. The need for a proper balance between the demands for living space and the needs for open areas — that is development vs. conservation — is still with us and the questions of local taxation and assessment of certain lands are still with us. House Doc. No. 3769 of 1966 presents these problems clearly and we do not understand that the proposed legislation is put forth as a complete solution to all the problems involved. It does serve the purposes claimed in Senate Doc. No. 1205 of 1968, and therefore as a step towards progress in conservation we endorse the bill in principle.

## 1969 DRAFT ACT

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AN ACT PROTECTING CONSERVATION AND PRESERVATION RESTRICTIONS HELD OR APPROVED BY APPROPRIATE PUBLIC AUTHORITY, PROVIDING FOR PUBLIC RESTRICTION TRACT INDEXES AT REGISTRIES OF DEEDS, AND CLARIFYING CERTAIN STATUTORY PROVISIONS RELATING TO RESTRICTIONS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       *Section 1.* Section 23 of Chapter 184 of the General Laws  
2 is hereby amended by adding at the end of the last sentence  
3 thereof:—“, or which have the benefit of section thirty-one.”

1       *Section 2.* Section 26 of Chapter 184 of the General Laws  
2 is hereby amended by substituting for the first paragraph  
3 and the first line of the second paragraph thereof the follow-  
4 ing:— “All restrictions on the use of land or construction  
5 thereon which run with the land subject thereto and are im-  
6 posed by covenant, agreement, or otherwise, whether or not  
7 stated in the form of a condition, in any deed, will or other  
8 instrument executed by or on behalf of the owner of the land  
9 or in any order of taking shall be subject to this section and  
10 sections twenty-seven through thirty, except (a) restrictions  
11 in leases, mortgages and other security instruments, (b) re-  
12 strictions in orders of taking by the commonwealth or a  
13 political subdivision or public instrumentality thereof made  
14 before January 1, 1970, and (c) conservation and preservation  
15 restrictions having the benefit of section thirty-one, and other  
16 restrictions held by any governmental body, if the instrument  
17 imposing such conservation, preservation, or other restrictions  
18 is duly recorded and indexed in the  
19 grantor index in the registry of deeds, or registered in the  
20 registry district of the land court, for the county or district  
21 where the land lies so as to affect its title, and describes the  
22 land by metes and bounds or by reference to a recorded or  
23 registered plan showing its boundaries, and if affecting land  
24 not registered is also indexed in a public restriction tract  
25 index maintained pursuant to section thirty-three, or if not  
26 so indexed, there has been no failure to file a notice of re-  
27 striction as therein provided. Governmental body as referred  
28 to in this section and sections thirty-one and thirty-three  
29 means the United States or the commonwealth or any of its  
30 departments, divisions, commissions, boards, agencies and po-  
31 litical subdivisions or any public authority or instrumentality  
32 thereof.

33       For the purposes of this section and sections twenty-seven  
34 through thirty:”

1        *Section 3.* Section 27 of Chapter 184 of the General Laws  
2 is hereby amended by adding at the end of clause (a) (1)  
3 thereof, before the word "or", the words "or is entitled to  
4 such benefit as a successor to such a party,".

1        *Section 4.* Chapter 184 of the General Laws is hereby  
2 amended by adding at the end thereof the following three  
3 sections:—

4        *Section 31.* No conservation restriction, as defined in sec-  
5 tion thirty-two, held by any governmental body or by a  
6 charitable corporation or trust whose purposes include con-  
7 servation of land of water areas or of a particular such area,  
8 and no preservation restriction, as defined in section thirty-  
9 two, held by any governmental body or by a charitable cor-  
10 poration or trust whose purposes include preservation of  
11 buildings or sites of historical significance or of a particular  
12 such building or site, shall be unenforceable on account of lack  
13 of privity of estate or contract or lack of benefit to particular  
14 land or on account of the benefit being assignable or being  
15 assigned to any other governmental body or to any charitable  
16 corporation or trust with like purposes, provided (a) in case  
17 of a restriction held by a city or town or a commission, au-  
18 thority, or other instrumentality thereof it is approved by  
19 the commissioner of natural resources if a conservation re-  
20 striction or the Massachusetts historical commission if a pres-  
21 ervation restriction, and (b) in case of a restriction held by  
22 a charitable corporation or trust it is approved by the mayor  
23 and council or aldermen of the city, or the selectmen or town  
24 meeting of the town, in which the land is situated, and by  
25 the commissioner of natural resources if a conservation re-  
26 striction and the Massachusetts historical commission if a  
27 preservation restriction.

28        Such conservation and preservation restrictions are in-  
29 terests in land and may be acquired by any governmental  
30 body or such charitable corporation or trust which has power  
31 to acquire interests in land, in the same manner as it may  
32 acquire other interests in land. Such a restriction may be  
33 enforced by injunction or proceeding in equity, and shall en-  
34 title representatives of the holder of it to enter the land in a  
35 reasonable manner and at reasonable times to assuer com-  
36 pliance. Such a restriction may be released in whole or in  
37 part by the holder for such consideration, if any, as the  
38 holder may determine, in the same manner as the holder may  
39 dispose of land or other interests in land, but only after a  
40 public hearing upon reasonable public notice, by the govern-  
41 mental body holding the restriction or if held by a charitable  
42 corporation or trust, by the city council or aldermen and  
43 mayor of the city or the selectmen of the town, whose ap-  
44 proval shall be required, and in case of a restriction requiring

approval by the commissioner of natural resources or the Massachusetts historical commission, only with like approval of the release.

Approvals of restrictions and releases shall be evidenced by certificates of the commissioner of natural resources or the chairman or clerk or secretary of the commission, council, aldermen or selectmen, duly recorded or registered.

In determining whether the restriction or its continuance is in the public interest, the governmental body acquiring, releasing or approving shall take into consideration the public interest in such conservation or preservation, and any national, state, regional and local program in furtherance thereof, and also any public state, regional or local comprehensive land use or development plan affecting the land, and any known proposal by a governmental body for use of the land.

This section shall not be construed to imply that any restriction, easement, covenant or condition which does not have the benefit of this section shall, on account of any provision hereof, be unenforceable. Nothing in this section or sections thirty-two and thirty-three shall diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain or otherwise and to use land for public purposes.

*Section 32.* A conservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to forbid or limit any or all (a) construction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (c) removal or destruction of trees, shrubs or other vegetations, (d) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, (f) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or (g) other acts or uses detrimental to such retention of land or water areas.

A preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to preservation of a structure or site his-



95 torically significant for its architecture, archeology, or as-  
96 sociations, to forbid or limit any or all (a) alterations in  
97 exterior or interior features of the structure, (b) changes in  
98 appearance or condition of the site, (c) uses not historically  
99 appropriate, or (d) other acts or uses detrimental to appropri-  
100 ate preservation of the structure or site.

101 *Section 33.* Any city or town may file with the register of  
102 deeds for the county or district in which it is situated a map  
103 or set of maps of the city or town, to be known as the public  
104 restriction tract index, on which may be indexed conservation  
105 and preservation restrictions and restrictions held by any gov-  
106 ernmental body. Such indexing shall indicate sufficiently for  
107 identification (a) the land subject to the restriction, (b) the  
108 name of the holder of the restriction, and (c) the place of  
109 record in the public records of the instrument imposing the  
110 restriction. Maps used by assessors to identify parcels taxed,  
111 and approximate boundaries without distances, shall be suf-  
112 ficient, and where maps by parcels are not available, addition  
113 to other maps of approximate boundaries of restricted land  
114 shall be sufficient. If the names of the holders and the in-  
115 strument references cannot be conveniently shown directly  
116 on the maps, they may be indicated by appropriate reference  
117 to accompanying lists. Such maps may also indicate similarly,  
118 so far as practicable, (a) any order or license issued by a  
119 governmental body entitled to be recorded or registered, (b)  
120 the approximate boundaries of any historic or architectural  
121 control district established under chapter forty-C or any  
122 special act, ordinance or by-law where a certificate of ap-  
123 propriateness may be required for exterior changes, (c) any  
124 landmark certified by the Massachusetts historical commis-  
125 sion pursuant to section twenty-seven of chapter nine, (d)  
126 any other land which any governmental body may own in  
127 fee, or in which it may hold any other interest, and (e) such  
128 additional data as the filing governmental body may deem  
129 appropriate.

130 Whenever any instrument or acquisition of a restriction or  
131 order or other appropriate evidence entitled to be indexed in  
132 a public restriction tract index is submitted for such indexing,  
133 the register shall make, or require the holder of the right to  
134 enforce the restriction or order or interest to make, appropri-  
135 ate additions to the tract index, and such addition shall, as  
136 to any restriction or order or other appropriate evidence pre-  
137 viously recorded entitled to be indexed, be likewise made on  
138 request of the holder of the right to enforce it.

139 The maps shall be in such form that they can be readily  
140 added to, changed and reproduced, and shall be a public rec-  
141 ord, appropriately available for public inspection. If any gov-  
142 ernmental body, other than a city or town in which the land  
143 affected lies, holds a right to enforce a restriction or order  
144 or an interest entitled to be indexed in a public restriction

tract index for any city or town which has not filed such an index, or if the commissioner of natural resources or the Massachusetts historical commission approves a conservation or preservation restriction held by a charitable corporation or trust so entitled, and the city or town does not within one year after written request to the mayor or selectmen file a sufficient map or set of maps for the purpose, the holding governmental body or approving commissioner or commission may do so.

The registers of deeds, or a majority of them, may, from time to time with the approval of the attorney general, make and amend rules and regulations for administration of public restriction tract indexes, and the provisions of section thirteen-A of chapter thirty-six shall not apply thereto. New tract indexes may be filed from time to time upon compliance with such rules and regulations as may be necessary to assure against omission of prior additions and references still effective.

Except in the case of a restriction noted on the certificate of title of registered land subject thereto, no conservation or preservation restriction which has the benefit of section thirty-one and is not so indexed in the public restriction tract index shall be enforceable after thirty years from the recording of the instrument imposing it unless before the expiration of such thirty years there is similarly recorded a notice of conservation or preservation restriction identifying the instrument and its place of record in the public records and naming one or more of the owners of record of each parcel of land to be affected by the notice, nor enforceable after twenty years from the recording of any such notice unless before the expiration of such twenty years another such notice is so recorded, and in each case the notice is indexed in the grantor index under the owner or owners named. Such notices may be given by any official of a governmental body holding the restriction, by the commissioner of natural resources in case of a restriction approved by him, by the chairman or acting chairman of the Massachusetts historical commission in case of a restriction approved by it, or by any official of any charitable corporation or trust holding the restriction or whose purposes include in case of a conservation restriction, the conservation of land or water areas, or in case of a preservation restriction, the preservation of buildings or sites of historical significance.

*Section 5.* Any restriction subject to section twenty-six to thirty of chapter one hundred eighty-four on the effective date of this act which would not have been so subject had this act been sooner in effect, shall have the same force as though never subject to said sections twenty-six to thirty. The time for filing a notice of restriction with respect to any

7 restriction existing at the effective date of this act and not  
8 theretofore required to be filed shall not expire sooner than  
9 one year after said effective date.

















# **FORTY-FIFTH REPORT**

## **Judicial Council of Massachusetts**

### **- 1969 -**

#### **I. THE COURTS**

**Special Justices Should Not Sit in the  
Superior Court  
Court Costs for Low-Income Litigants**

#### **II. PROBATE COURT PROCEDURES AND PRACTICE**

**Remarriage of Divorced Parties  
Possession of the Marital Domicile**

#### **III. CORRECTIVE LEGISLATION**

**Increase In the Homestead Exemption**

#### **IV. CRIMINAL LAW AND PROCEDURE**

**Appeals from Probation  
Bail Reforms  
Liability and Punishment of  
Corporations for Crime**

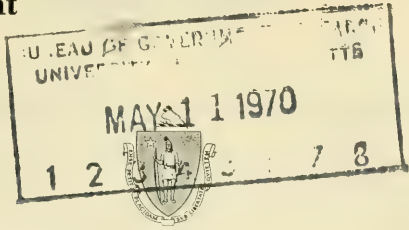
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**Age of Majority at Eighteen?  
Liability of Credit Bureaus**

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**FORTY-FIFTH REPORT**  
**Judicial Council of Massachusetts**  
**— 1969 —**

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**The Commonwealth of Massachusetts**

**JUDICIAL COUNCIL**

December, 1969

TO HIS EXCELLENCY, FRANCIS W. SARGENT,  
*Acting Governor of Massachusetts*

In accordance with the provisions of Section 348 of chapter 221 of the General Laws (Ter. Ed.), we have the honor to transmit the forty-fifth annual report of the Judicial Council for the year 1969.

REUBEN L. LURIE

JOHN A. COSTELLO

ELWOOD H. HETRICK

ELIJAH ADLOW

ARTHUR A. THOMSON

CHARLES W. BARTLETT

LIVINGSTON HALL

PAUL A. TAMBURELLO

PAUL T. SMITH

## 1969 HOUSE AND SENATE BILLS REFERRED TO THE JUDICIAL COUNCIL

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## JUDICIAL COUNCIL

### G. L. (Ter. Ed.) Chapter 221, §§34A-34C

The Judicial Council Was Established To Make A Continuous Study of The Organization, Procedure and Practice Of The Courts.

The Council Makes Reports Requested By The Legislature, and Suggests Improvements in the Administration of Justice.

#### Statutory Authority

*Section 34A.* There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointment by the governor shall be for such periods not exceeding four years, as he shall determine.

*Section 34B.* The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

*Section 34C.* No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof shall receive from the commonwealth a salary of five thousand dollars.

**Recommendations for Improving the Effectiveness of the Judicial Council Appear in this Report on Page 39**

## MEMBERS OF THE COUNCIL

(DECEMBER, 1969)

HONORABLE ELIJAH ADLOW of Boston, *Chairman*

REUBEN L. LURIE of *Brookline*

JOHN A. COSTELLO of *Andover*

ELWOOD H. HETTRICK of *Weston*

ARTHUR A. THOMSON of *North Andover*

LIVINGSTON HALL of *Concord*

CHARLES W. BARTLETT of *Dedham*

PAUL A. TAMBURELLO of *Pittsfield*

PAUL T. SMITH of *Brighton*

JAMES B. MULDOON of *Weston*, *Secretary*

Three Center Plaza, Boston, Mass. 02108

## INQUIRIES CONCERNING THIS REPORT

This report is distributed by the Public Document Room at the State House in Boston. Copies are sent to all members of the legislature, judges, clerks of court, libraries, city and town clerks, and many others. As long as the supply lasts, copies of this report and also copies of some earlier reports, can be obtained, without charge, by requesting them from the Public Document Room, State House, Boston, Massachusetts.

Correspondence may be sent to James B. Muldoon, Secretary, Judicial Council of Massachusetts, Three Center Plaza, Boston, Massachusetts 02108.

## THE JUDICIAL COUNCIL

We again recommend the enactment of either of the two suggested bills printed in this report which are intended to increase the salary of the secretary of the Judicial Council. We have requested favorable action on this proposal for the past four years. We hope for early favorable action this year.

One of these bills increases the salary to ten thousand dollars a year; the other would permit the Council to establish the salary.

The Judicial Council is not permitted to accept grants from any fund or foundation to assist with its research or other work. All of the research must be done by the secretary. We have no law clerks and are consistently hampered in trying to give the General Court, the Governor, and the Courts the type of constructive suggestions that will benefit the commonwealth.

We think that an impartial evaluation of this public document and the reports prepared by the present secretary since 1964 will indicate that his efforts have been beneficial to all who are concerned with our work.

The present salary was established in 1947; is it not time to remedy this obvious legislative oversight? He ought to be given a raise.

We trust that we have responded satisfactorily to the requests for our conclusions and recommendations which have been made by the General Court over the forty-five years the council has existed. To do this job properly, we again ask the General Court for adequate funds to perform our work and for the payment of a decent compensation to the secretary.

We recommend either of the following draft acts:—

## 1970 DRAFT ACT

AN ACT TO ENLARGE THE SCOPE AND FUNCTIONS OF THE JUDICIAL COUNCIL.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Section 34A of chapter 221 of the General Laws is hereby amended by adding at the end thereof the following:— Said council shall investigate and evaluate the reasonable needs of the judiciary on a continuing basis so as to insure that the court functions at maximum efficiency, and thereafter to recommend the necessary legislation in regard thereto.

The council shall engage in a continuing examination of the law of the commonwealth with a view to recommending such changes as it deems necessary to modify inequitable rules of law, to correct deficiencies which frustrate the objectives of the law, and to bring the law into harmony with modern conditions.

The council shall receive proposed changes recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, bar associations, judges, lawyers, members of the general court, house and senate counsel, public officials, as well as any other individuals or groups.

SECTION 2. Section 34C of chapter 221 of the General Laws is hereby amended by striking out the final sentence and inserting in place thereof the following sentence:— The secretary of said council, whether or not a member thereof, shall receive from the Commonwealth a salary of ten thousand dollars.

SECTION 3. Section 34A of Chapter 221 of the General Laws is hereby further amended by striking out the words—"one judge of a probate court in the Commonwealth and one justice of a district court in the Commonwealth"—and inserting in place thereof the words—"the chief justice of the probate courts of the Commonwealth or some other judge of Probate appointed from time to time by him, and the chief justice of the district courts of the Commonwealth or some other justice of a district court appointed from time to time by him"—

## 1970 DRAFT ACT

AN ACT TO ENLARGE THE SCOPE AND FUNCTIONS OF THE JUDICIAL COUNCIL.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1       Section 1. Section 34A of chapter 221 of the General
- 2       Laws is hereby amended by adding at the end thereof the
- 3       following: — Said council shall investigate and evaluate



4 the reasonable needs of the judiciary on a continuing  
5 basis so as to insure that the court functions at maxi-  
6 mum efficiency, and thereafter to recommend the neces-  
7 sary legislation in regard thereto.

8 The council shall engage in a continuing examination  
9 of the law of the commonwealth with a view to recommend-  
10 ing such changes as it deems necessary to modify inequi-  
11 table rules of law, to correct deficiencies which  
12 frustrate to objectives of the law, and to bring the law  
13 into harmony with modern conditions.

14 The council shall receive proposed changes recommended  
15 by the American Law Institute, the National Conference of  
16 Commissioners on Uniform State Laws, bar associations,  
17 judges, lawyers, members of the general court, house and  
18 senate counsel, public officials, as well as any other  
19 individuals or groups.

1 *Section 2.* Section 34C of chapter 221 of the General  
2 Laws is hereby amended by striking out the final sentence  
3 and inserting in place thereof the following two sen-  
4 tences: — The Secretary of said council, whether or not  
5 a member thereof, shall be a member of the Massachusetts  
6 Bar and shall receive from the Commonwealth a salary to  
7 be fixed by said council.

1 *Section 3.* Section 34A of chapter 221 of the General  
2 Laws is hereby further amended by striking out the  
3 words—"one judge of a probate court in the Commonwealth  
4 and one justice of a district court in the Commonwealth"—  
5 and inserting in place thereof the words — "the chief  
6 justice of the probate courts of the Commonwealth or some  
7 other judge of Probate appointed from time to time by him,  
8 and the chief justice of the District courts of the  
9 Commonwealth or some other justice of a district court  
10 appointed from time to time by him"—

# I. THE COURTS

## PRACTICE AND PROCEDURE

1. Payment of Litigation Costs for Indigent Persons.
2. Service of Process by Registered or Certified Mail by Rule of Court.
3. Special Justices Should Not be Authorized to Sit in Superior Court.
4. Justices of District Courts Should be Authorized to Hear Gaming Cases When Sitting in Superior Court.
5. Revision of Civil Procedure — The Demise of Contributory Negligence — Enter Comparative Negligence.
6. Injunctive Relief for Unauthorized Use of Photographs etc; Invasion of Privacy.
7. Exemptions for Property Seized on Executions to Satisfy a Judgment.
8. Superior Court Rule 72 on Exceptions Amended to Allow More Time.
9. Confidential Communications.

### 1. Payment of Litigation Costs to Indigent Persons

**SENATE . . . (1969) . . . No. 668**

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AN ACT PROVIDING FOR PROCEEDINGS IN FORMA PAUPERIS IN THE  
COURTS OF THE COMMONWEALTH.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 The General Laws are hereby amended by inserting after
- 2 chapter 273A the following chapter:—
- 3 CHAPTER 273B
- 4 COURT PROCEEDINGS IN THE CASE
- 5 OF POOR PERSONS.
- 6 *Section 1.* Any person may commence, prosecute, or defend
- 7 any action or proceeding, or appeal therein, in any court of
- 8 the commonwealth, without being required to pay fees and
- 9 costs or security therefor upon making affidavit in said court
- 10 that he is unable to pay such fees and costs or to give se-
- 11 curity therefor. Such affidavit shall set forth the amount and

sources of the affiant's income and shall list his property with its value. The affidavit shall state the nature of the action, defense or appeal, and shall contain sufficient facts so that the merit of the affiant's contentions can be ascertained; and whether any other person is beneficially interested in any recovery sought and, if so, whether every such person is unable to pay such fees and costs or security. An executor, administrator or other representative may file such affidavit on behalf of a deceased, infant or incompetent poor person.

If court action has already been brought against such poor person, notice of his said affidavit shall be given to all parties, and to the county official responsible for the disbursement of funds for the administration of the courts.

*Section 2.* If the judge of said court is satisfied that such affiant is not financially able to proceed in such action, defense or appeal and that there is merit to his contentions concerning such action, defense or appeal, the judge shall issue an order that the affiant be allowed to litigate as a poor person, and shall assign an attorney to represent such person. The court in which such action is tried shall furnish such poor person or his counsel, upon written request, a transcript of the testimony, without payment of any fee therefor, and shall issue to the official stenographer of such court a certificate stating the amount of the fee to which said stenographer is entitled for his services in preparing such transcript. Said fee shall be paid to the stenographer by the county treasurer upon presentation of such certificate.

*Section 3.* On an appeal a poor person shall not be required to furnish an undertaking or security for costs, and the court may direct that different and inexpensive methods, such as the use of typewritten briefs and appendices, be employed in the preparation and transmission of all documents which the court must have before it.

*Section 4.* An account of all costs incurred on behalf of a poor person under this chapter shall be kept by the clerk of the court or other public officer to whom such costs would have been payable, and by the county to the extent that it has expended any money for or on behalf of such poor person.

A person shall not be liable for the payment of any costs or fees unless there is a recovery by judgment or by settlement in his favor, in which case the court may direct him to pay from the amount received as a result of such judgment or settlement, all or part of the costs and fees, a reasonable sum for the services of his attorney and any sum expended by the county on behalf of such poor person. If judgment is entered for such poor person, costs shall be taxes in his favor as provided by laws, and when collected, shall be

60 applied to pay costs which otherwise would have been required  
 61 and which have not been paid.  
 62 Section 5. Any recovery by judgment or by settlement in  
 63 favor of such poor person shall be paid to the clerk of the  
 64 court in which the order permitting the person to proceed as  
 65 a poor person was entered, and shall await distribution pur-  
 66 suant to the order of said court.

We considered a second bill on the same subject:—

## HOUSE . . . . (1969) . . . . No. 348

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AN ACT TO PERMIT AN INDIVIDUAL TO PROSECUTE OR DEFEND ANY ACTION OR  
 APPEAL IN ANY COURT WITHOUT THE PAYMENT OF AN ENTRY FEE BY PROCEEDING  
 IN FORMA PAUPERIS.

*Be it enacted by the Senate and House of Representatives in General Court  
 assembled, and by the authority of the same, as follows:*

1 Any person may commence, prosecute or defend any action  
 2 or proceeding in any court, or appeal therein, without being  
 3 required to give security for costs or to pay any filing or entry  
 4 fee, upon filing in said court, and receiving approval of the  
 5 affidavit by the court his affidavit that because of his poverty  
 6 he is unable to pay the costs of said action or proceeding, or  
 7 appeal therein, or to give security for the same, and that he  
 8 believes that he is entitled to the redress that he seeks in such  
 9 action or proceeding, or appeal, and setting forth briefly the  
 10 nature of his cause or appeal, or defense. If such person sub-  
 11 sequently recovers costs, the recovered amount shall first be  
 12 applied to pay any filing or entry fees which were waived under  
 13 this subsection.

### The Pending U.S. Supreme Court Case

These proposals would permit persons of low income, including all of those receiving public assistance, to proceed in court without the payment of certain fees which are paid by others.

The legal issues involved in this matter have been presented to the U. S. Supreme Court in the case of *Gladys Boddie et al v. State of Connecticut et al.*

This case was filed for the October term of 1969 and is an appeal from the decision of the U. S. District Court of the District of Connecticut.

In the *Boddie* case, the Clerk of the Superior Court for New



Haven County, Connecticut, refused to accept certain divorce writs until the entry fee of \$45 was paid. This fee is much higher than the fee in the probate courts of Massachusetts which is only \$15.00.

After the divorce writs were rejected by the Clerk of Court, the Superior Court judge for the Family Relations Session and Justice John P. Cotter of the Connecticut Supreme Court, the administrator for the Connecticut court system, refused to grant an application to enter the writs without payment of the fees.

Gladys Boddie and eight other female divorce petitioners then brought action in the U. S. District Court of the District of Connecticut in which they said among other things:

“This is an action for a declaratory judgment and injunction preventing the defendants from interfering with the plaintiffs’ rights to equal protection and due process of laws under the Fourteenth Amendment to the United States Constitution; and the jurisdiction of this court is invoked under 28 U.S.C., sections 1343 (3), 2201, 2202 and 42 U.S.C., sections 1981, 1983, and 1988.”

After reciting that court costs in a divorce are normally in excess of \$60, service by sheriff as much as \$15, and service by publication may exceed \$100, the divorce petitioners alleged that each was a Welfare recipient and that there was no allowance for legal fees in the Welfare allotments.

The petitioners then alleged as follows:

“The named plaintiffs have therefore been denied access to the Courts of Connecticut solely because of inability to pay court fees and expenses, and have therefore been denied due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.”

Each of the petitioners filed a financial affidavit. The affidavit of Gladys Boddie is as follows:

FINANCIAL AFFIDAVIT

Affiant hereby respectfully represents that:

- 1. She is the plaintiff in the above captioned proceeding.
- 2. Her income consists solely of an allotment received from the Department of Welfare, State of Connecticut, totalling \$361.50 per month.
- 3. On the above income she supports herself herself and six children.
- 4. The normal monthly expenses incurred for herself and her children are as follows:

Food	\$141.00
Rent	100.00
Utilities	26.00
Clothing	50.00
Laundry	5.00

Household	10.00
Transportation	10.00
Entertainment	12.00
Education	8.00
Miscellaneous	5.00 water bill
<hr/>	
Total	\$367.00

5. She has no assets or property other than personal items, such as clothing or jewelry, and necessary household furniture, all with an approximate value of \$600.00.
6. Her welfare benefits from the State of Connecticut do not include an allotment for legal and court fees.
7. She has no income, property or assets from which she can afford to pay the fees, costs, expenses and security in the proceeding.
8. Her attorney is serving without fee in this case.

/s/ Gladys G. Boddie

The petitioner, Mamie Williams also had six children and a budget similar to Gladys Boddie. The other petitioners had fewer children and their Welfare allotments were less, understandably.

The State of Connecticut made a motion to dismiss on the basis that the petitioners did not show that they had been deprived of any rights, privileges, or immunity secured by the Constitution and Laws of the United States.

The matter was argued and the motion to dismiss was granted by a three judge federal court on July 16, 1968.

### The Circuit Court Decision

In the decision written by J. Joseph Smith of the U. S. Circuit Court for the Second Circuit, the legal ramifications of this matter are discussed. Judge Smith points out that the statute in Connecticut requiring the payment of filing fees applies to indigent persons as well as non-indigent persons, as is the case in Massachusetts. There is no provision in the statute in either state for fees to be waived.

The "heart of the matter" as stated by Judge Smith is this: "May a state limit access to its civil courts and particularly in this instance, to its divorce courts, by the requirement of a filing fee or other fees which effectively bar persons on relief from commencing actions therein?"

The position taken by the Second Circuit in Judge Smith's decision is as follows:

" . . . we must assume that these plaintiffs are effectively barred from

bringing suit by the filing fee and other costs. We will assume further that the \$45 filing fee alone is a sufficient bar in the case of some at least of the plaintiffs. Since anyone who pays the fees may at least file his complaint, it is plain that there is in effect a classification of prospective civil suitors between those able to afford the court costs and those unable to afford them."

## Due Process

"Plaintiffs insist that such a classification, based solely on affluence (or poverty) is inadmissible as in violation of equal protection of the laws and due process. Plaintiffs argue with considerable force that access to the civil courts and particularly in domestic relations cases is a right of great importance, comparable to the right of freedom from imprisonment on unjust conviction of crime enforced in criminal and habeas corpus cases, so that its exercise may not be unequally restricted, under the teaching of, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956), *Smith v. Bennett*, 365 U.S. 708 (1961), *Lane v. Brown*, 372 U.S. 477 (1962).

But there are, of course, differences between the right to freedom from capital punishment or imprisonment and the right of access to civil courts to adjudicate claims to money or property or adjust marital status.

We have not yet gone so far as to hold that no state services may be conditioned on payment of fees, cf. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966), so long as the fees are reasonably considered by the legislature to be required for legitimate state purposes."

## Equal Protection

"Our problem is whether and to what extent the political theories of the role of the state toward the indigent have changed as reflected in present "notions of what constitutes equal treatment for purposes of the Equal Protection Clause . . ." Political theories of this role are changing in the particular field brought before us in this action, as witnessed by the provision for in forma pauperis civil actions by the Congress and many, perhaps most, of the states.<sup>2</sup> But failure of the other states, including Connecticut, to keep up with this developing trend has not yet been considered by any court to constitute a lack of equal treatment under the Equal Protection Clause."

## Who Should Pay?

In the Circuit Court decision, Judge Smith noted that the Equal Protection Clause "is not shackled to the political theory of a particular era", and that "Notions of what constitutes equal treatment

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<sup>2</sup> See the Indigent's Right to Counsel in Civil Cases, 76 Y.L.J. 545, 559 n.68 (1967).

for purposes of the Equal Protection Clause *do change*.”<sup>1</sup> It was also noted that the state does have a direct role in a criminal case.

“In the ordinary civil (including divorce) case the state has no such direct participation, merely providing the judicial machinery for determination of the disputes. And the state does have at least two legitimate purposes in court fees, first, providing financial support for the court establishment (perhaps one-fifth of its cost in Connecticut, we are told), and second, discouraging resort to litigation in purely frivolous matters, which might much more often be filed by indigent and affluent alike if the service were entirely free from cost.

It is, however, entirely possible that the failure of the state to provide in forma pauperis relief in the civil courts is the product, not of considered choice or deliberate classification, but rather of inertia born of lack of existence of the problems of the indigent in present proportions, or at least lack of recognition of their present extent as it affects availability to the indigent of the processes of the civil courts open to others. In these circumstances we should hesitate to act in any case until the ordinary political processes have an opportunity to function in normal course.

Many states—at least 23, we are told, as well as the United States, provide that indigents may proceed in the civil courts in forma pauperis, without payment of fees. We agree that this is desirable, and that Connecticut might well follow the example and remove the discrimination now suffered by the indigent in access to the civil courts. But we do not feel that the present system, undesirable as it is, is a denial of a right so fundamental that the Constitution, by the equal protection or due process clause, forbids the state from its continuance.

Militating against striking down the present fee legislation by judicial fiat is the extreme difficulty of judicial determination of the course the state should be required to follow. Should the relief agencies provide the fees as part of support to the indigent? From what source should such funds be obtained, and how should they be administered? Should the state courts be required to waive court fees for the indigent?”

“The choice of which method is more fitted to the needs and policy of the state is a legislative choice the courts should take on only if necessary. Likewise with related matters. Should the state pay for the indigent other quite essential costs, which are not now provided or paid for by the state for any private litigants, such as process service fees, or service by publication, investigative and legal services?”

### What Costs Should be Paid?

A reading of Senate (1969) No. 668 leads to the conclusion that it would cover all “quite essential costs” including the fees of an attorney. House (1969) No. 348 speaks merely of the “costs of such action or proceeding” and the “filing fee”. The House bill

<sup>1</sup> In 1816 Simeon Williams, on trial at Cambridge for burglary asked through his attorney that witnesses be called at the expense of the Commonwealth “*the defendant being very poor*”. The court said that this was allowable only in capital cases “in favor of life.” Notions do change indeed. See: *Com. v. Williams*, XIII Tyng 501.



seems limited to the actual filing fees and the traditional "costs" which are minimal and do not include legal fees, service by publication, and the normal expenses of litigation and appeal.

It is seriously proposed by legal assistance project attorneys and other interested groups that all costs, fees, and expenses of litigation for indigent persons should be underwritten by the state or county. A deposition where the plaintiff seeks to learn facts to assist him in presenting his case might cost \$250.00 for the stenographic transcript and the services of the attorney, and the cost of summoning witnesses and paying their fees. The deposition may well be a "quite essential cost" in a given case and in fact may be a deciding factor in the end result. It is argued that the indigent can not afford depositions and the like. It might be observed that in a tort case handled on a contingent fee it is the lawyer, not the indigent plaintiff, who advances these costs.

In the concluding paragraph of the Circuit Court decision, Judge Smith said this:—

### **Correction by Legislative Action**

"Although with some hesitation, we conclude that the court should not, by resort to the Constitutional guarantees which for 100 years have been considered not to demand such state action, attempt to speed up the amelioration of the lot of the indigent by forcing the state to provide free access to the civil courts without payment of a relatively modest fee. We should rather leave this to correction by the political process through legislative action, which may reach a more satisfactory result more speedily than the present available machinery of the courts can effectively accomplish."

### **The Present Appeal to the U.S. Supreme Court**

In the decision which was appealed to the U. S. Supreme Court, the indigent petitioners made an analogy to a number of criminal cases where the U. S. Supreme Court has held that there can be no denial of justice in a *criminal* case on the basis that a person does not have sufficient money to pay for the necessary court costs and expenses in appealing his conviction. The petitioners rely greatly on the case of *Griffin v. Illinois*, 351 U. S. 12 (1956), where the court said that the state must provide a transcript on appeal to an indigent prisoner.

In the *Griffin* case (351, U.S. at 16-17) the court said:

"Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of the Magna Charta: 'To no one will we sell, to no

one will we refuse, or delay, right or justice. . . No free man shall be taken or imprisoned, or disseised, or outlawed; or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' ”

In the *Boddie* case it is argued in behalf of the petitioners that there is no distinction between a criminal case and a civil case in the matter of filing fees and the like. It is argued that a divorce case is one in which the state has an interest, and that a marriage can only be dissolved by judicial decree.

In the case of *Jeffreys v. Jeffreys*, 296 N.Y.S. 2d 74, the New York Supreme Court said (at page 87):

“Marriage is clearly marked with the public interest. In this State, a marriage cannot be dissolved except by ‘due judicial proceedings’ (N. Y. Const. Art. I, §9). We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication. . . . This hurdle is an effective barrier to Mrs. Jeffreys’ access to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained. Such a right is, it seems to me, as basic as Griffin’s right to appeal and Mrs. Harper’s right to vote. It is manifestly discriminatory under Griffin standards to deprive Mrs. Jeffreys of that right while affording it to others with money.

I hold that she has been denied the equal protection of the laws guaranteed to her by the State and Federal Constitutions.” \*

The argument has often been made in Massachusetts that some of the cost of the operation of the courts should be borne by those who utilize them. The administrative situation in Massachusetts is such that the county rather than the state is the political subdivision which pays the court costs. The fees collected do not meet the cost by any means. The same is true in the State of Connecticut where filing fees only accounted for one tenth of the \$15 million annual cost of the judicial system.

In the *Boddie* case the petitioners argued that the wealthy would not be deterred by legal fees of over \$100. Thus the alleged result is to eliminate only the litigation of the poor without regard to the merit of that litigation, while even the most frivolous suit may be filed by a wealthy person.

It might be observed at this point that there are substantial numbers of our citizens, who are not receiving public assistance, who probably cannot really afford the costs of litigation. Included in this group are many of the wage earners of our commonwealth. We do not have as much of a problem in a divorce case, for example,

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\* NOTE: The Supreme Court of New York is not the highest court of the State of New York.

as in some other places because the fees and costs are not as great. The principle remains the same in any event.

The petitioners in the *Boddie* case also take the position that many social scientists have concluded that "non-whites whose income tends to be much lower than that of whites finds it less troublesome and less expensive to separate than to divorce."

It is also contended that if indigent persons are barred from divorce, their only position is to separate or to live together in unhappiness.

In June of 1969 the Connecticut Legislature turned down three separate bills which would have provided for divorce proceedings for indigents in Connecticut without cost to the individuals involved. The reaction of the petitioners to this refusal of the Connecticut Legislature was that the matter should be resolved by the court as the "Connecticut courts remain closed to the poor." In addition, the petitioners say:

"The Sovereign covenanted centuries ago in the Magna Charta not to sell justice."

## THE NEW JERSEY CASE

In *Suber v. Suber*, —N. J.—, (1969) the Superior court of New Jersey for Union County gave orders to arrange for service of process without cost to an indigent divorce litigant, saying:

"It is not hard to understand the cynicism of the people of the ghetto towards our legal system as an outlet for grievances and disputes. A person charged with a criminal offense is brought before the bar of justice expeditiously. He is given a free trial, free lawyer, and if necessary free appeals. Yet a deserted woman, who feels as imprisoned as a convict and who may be able to free society of the burden of supporting her if she could remarry, is denied the relief of our courts. It is unjust to give better treatment to those who break society's laws than to those who attempt to live by the rule of law and order."

The New Jersey decision was thus based on a concept that the Constitution requires the same sort of protection on the civil side of the court as on the criminal side.

It is difficult to understand why the argument in the *Boddie* case would not be just as valid for every citizen. Is there a constitutional principle which requires the state to pay the costs for all litigants?

## Waiver of Fees In Massachusetts for Divorce Cases

Under the provisions of G. L. Chapter 262 § 4, which deals with fees payable for the entry of cases in the Supreme Judicial and

Superior courts, and for divorce or allotment proceedings in the Superior Court, a \$5 fee is required:—

“provided, however, that the court may, if it finds that the entering party is destitute and unable to pay, order the payment of such entry fee to be waived.”

At one time divorce cases were heard in the Supreme Judicial Court, and some were heard in the Superior Court. Few cases are filed in the Superior Court in which a divorce is sought but a proceeding is possible in that court, and there is authority to waive the fee. Oddly enough the filing fee in the Massachusetts probate courts for a divorce is \$15.00 while it is only \$5.00 in the Superior Court. The filing fee can be waived in the Superior Court. There will be four divorce sittings in Suffolk County in 1970, for example.

### Position of the State of Connecticut

The State of Connecticut took the position that the Connecticut Court could not waive payment of the entry fee unless a statute was enacted (such as G.L. (Ter. ed.) Chapter 262 § 4) and stated further that forma pauperis procedures are a matter of privilege.

It was further contended that it was for the Legislative Branch (which provides the funds for all phases of Government) to enact a law on the subject, and not within the province of the courts to do so.

The question arises as to whether or not the relief agencies, some of which are funded in part by federal grants, (one-third) should provide the funds for payment of fees. The following is a copy of the budget for the Legal Services Program in Connecticut as approved by the Department of Health, Education and Welfare.

“Excerpt from Budget for demonstration project  
NO. 543 “Legal Services Program”

#### ATTACHED LIST #3

OTHER EXPENDITURES	Total	Regular	S.F.P.
	Cost	Federal Share	Funds
25 Panel Lawyers (average 3 clients @ 30 hrs. ea. @ rate of \$16. per hour, total of 2250 hours)			
ADC	32,400.00	24,300.00	8,100.00
Adult categories	3,600.00	1,800.00	1,800.00
Rental & maintenance of office space 800 sq. ft. @ \$4.00 per sq. ft. per one year and \$.50 per sq. ft. for maintenance	3,600.00	2,700.00	900.00



## LEGAL EXPENSES:

Court costs	1,000.00	750.00	250.00
Reserve fund for law students and cases with waiver of 30 hr. limitation	7,100.00	5,325.00	1,775.00
Bar Administrator	4,500.00	3,375.00	1,125.00
Litigation Costs	1,000.00	750.00	250.00
Bonding & insurance	350.00	262.50	87.50
Law library & publications	2,000.00	1,500.00	500.00

## OFFICE EXPENSES:

Rental of copier	500.00	375.00	125.00
Accounting	300.00	225.00	75.00
Telephone	1,000.00	750.00	250.00
Postage	200.00	150.00	50.00
Evaluation of Project	8,000.00	6,000.00	2,000.00
Staff Training & Conferences	4,000.00	3,000.00	1,000.00
	<hr/> 69,550.00	<hr/> 51,262.50	<hr/> 18,287.50

### The \$45.00 Filing Fee

It is significant to note that for the entry of every civil case in Connecticut in the Supreme and Superior Courts, the fee is \$45. It would seem that this might be of considerable interest to the General Court as the fee in Massachusetts is but \$5 in our supreme and superior courts.

The State of Connecticut argued that "entry fees have the classical effect of reducing the amount of frivolous litigation", and the State of Connecticut also argued:

"It is respectfully submitted that appellants should not forget the vast middle classes who earn a moderate living and must make a financial sacrifice if they choose to bring a civil action. This large group might be the subject of discrimination if only welfare recipients are granted in forma pauperis privileges. One must not create reverse discrimination. See *Griffin v. Illinois*, 351 U.S. 12 (1956). Dissenting opinion of Justice Harlan p. 35."

The *Boddie* case will be decided by the U.S. Supreme Court in the 1970 term, under normal circumstances.

This decision may uphold the circuit court; it may require the waiver of the \$45.00 filing fee; it may be limited to divorce cases; it even may require the states to provide justice without cost to the litigant, if he is indigent. To go full range, it may require the state to provide an attorney in civil cases where there is some public interest involved. We do not care to speculate on the result but are convinced that it will be significant. It will prove difficult to determine the point of indigency in the realm of filing fees, litigation expense, and costs.

## THE 1969 MASSACHUSETTS CASE

### **Rita Coonch v. Louis F. Musco, Register of Probate**

The issue of filing fees in divorce cases was raised in Massachusetts during 1969 in the Suffolk County Probate Court when an attorney for the Boston Legal Assistance Project attempted to file a divorce libel without the payment of a fee. The assistant register of probate, and the Register of Probate were obliged to refuse to accept the paper for filing.

When the petitioner could not file the libel without the payment of a fee, a mandamus proceeding was commenced in the Suffolk County Superior Court (No. 642252) under the name of *Rita Coonch v. Louis F. Musco, Register of Probate*.

The allegations in this Bill in Equity recited the refusal of the register to accept the libel and asserted that this refusal amounted to:—

1. A violation of Article XI of the Massachusetts Constitution which reads:

“Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”

2. A denial of the right to petition the government for redress of grievances as provided in the U. S. Constitution.

3. A denial of due process of law under the XIV Amendment to the U. S. Constitution. ( *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967).

4. A denial of equal protection of the law because in the Superior Court filing fees can be waived under G. L. Chapter 262 Section 4.

5. The creation of a distinction between rich and poor.

From the historical perspective, it might be interesting to keep in mind that the probate courts of the Commonwealth have been maintained by either the State or the County without any direct contribution from the public seeking remedies therein. Prior to the passage of Chapter 141 of the Acts of 1823, the probate courts had been maintained by the various counties, the county paying for stationery, equipment and furnishing quarters for the judges and registers whose compensation consisted of the fees received by them for petitions filed in the court. Currently the income from fees does not begin to cover the cost of the operation of any court.

It is a question of legislative discretion as to whether or not filing

fees should be waived in appropriate cases in the Probate Courts of the Commonwealth. There is somewhat of an inconsistency in providing a method for waiving fees in the Superior Court and refusing to permit a waiver in the Probate Court.

It is a larger question as to how far the indigent or low income individual, whether receiving welfare or not, should be provided with funds to carry on litigation. The waiver of filing fees seems to be of small importance in Massachusetts where such fees are \$2.00 in the District Court, \$5.00 in the Supreme Judicial Court and Superior Court, and up to \$15.00 in the Probate Court.

*We do not recommend either bill.*

**2. Service of Process  
by Registered or Certified Mail  
by Rule of Court**

**HOUSE . . . . (1969) . . . . No. 5000**

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APPENDIX A.

AN ACT TO AUTHORIZE COURTS TO MAKE RULES PROVIDING FOR SERVICE OF PROCESS  
BY REGISTERED MAIL.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1       SECTION 1. Section 1 of chapter 185 of the General Laws, as  
2       most recently amended by chapter 722 of the acts of 1962, is  
3       hereby further amended by adding at the end of said section  
4       the following words: — Said rules may, notwithstanding any  
5       other provision of law, make provision for service of process  
6       by registered mail, in such classes of cases, and subject to  
7       such conditions and qualifications, as may be determined to  
8       be necessary.
- 1       SECTION 2. Section 3 of chapter 213 of the General Laws, as  
2       most recently amended by chapter 582 of the acts of 1945, is  
3       hereby further amended by inserting after the eleventh  
4       paragraph the following new paragraph:—  
5       Twelfth: Notwithstanding any other provision of law, the  
6       courts may also make and promulgate rules providing for  
7       service of process by registered mail, in such classes of cases,  
8       and subject to such conditions and qualifications, as the  
9       justices of said courts may determine.
- 1       SECTION 3. Section 30 of chapter 215 of the General Laws

2 is hereby amended by adding to the end of said section the  
3 following new sentence:—Notwithstanding any other provi-  
4 sion of law, said rules may include provision for the service  
5 of process by registered mail, in such classes of cases, and  
6 subject to such conditions and qualifications, as may be  
7 determined to be necessary.

1 SECTION 4. Section 43 of chapter 218 of the General Laws,  
2 as most recently amended by chapter 810 of the acts of 1963,  
3 is hereby further amended by inserting after the first sentence  
4 the following new sentence: — Notwithstanding any other  
5 provision of law, the chief justice may make and promulgate  
6 uniform rules providing for service of process by registered  
7 mail, in such classes of cases, and subject to such conditions  
8 and qualifications, as he may deem necessary.

1 SECTION 5. Section 50 of said chapter 218, as most recently  
2 amended by chapter 810 of the acts of 1963, is hereby further  
3 amended by adding the following sentence: — Notwithstand-  
4 ing any other provision of law, the court may from time to  
5 time make rules providing for service of process by registered  
6 mail, in such classes of cases, and subject to such conditions  
7 and qualifications, as may deem necessary.

1 SECTION 6. Section 60 of said chapter 218, as most recently  
2 amended by chapter 659 of the acts of 1965, is hereby further  
3 amended by adding at the end thereof the following new  
4 sentence: — Notwithstanding any other provision of law, the  
5 court may make and promulgate rules providing for service of  
6 process by registered mail, in such classes of cases, and  
7 subject to such conditions and qualifications, as it may deem  
8 necessary.

Another bill calls for certified mail as well as registered mail:—

HOUSE . . . . (1969) . . . . No. 2491

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RESOLVE PROVIDING FOR INVESTIGATION AND STUDY BY A SPECIAL COMMISSION REL-  
ATIVE TO THE EFFICACY OF PRESENT PROCEDURES FOR COMPLETING SERVICE OF  
PROCESS AND TO THE DESIRABILITY OF UTILIZING CERTIFIED OR REGISTERED MAIL.

1 *Resolved*, That a special commission, to consist of two  
2 members of the senate, three members of the house of  
3 representatives, two members of the Massachusetts bar, one  
4 member of a legal service agency, and two persons to be  
5 appointed by the governor, all said persons to be conversant  
6 with the problems regarding service of process, is hereby  
7 established for the purpose of making an investigation and  
8 study relative to the efficacy of present procedures for com-  
9 pleting service of process and to the desirability of utilizing



10 certified or registered mail.

11 (A) Said commission may travel within or without the  
12 commonwealth and may require by subpoena the attendance  
13 and testimony of witnesses and the production of books and  
14 papers.

15 (B) Said commission shall expend such sums in conducting  
16 its investigation and study as may be appropriated there-  
17 for.

18 (C) Said commission shall report to the general court the  
19 results of its investigation and study, and its recommenda-  
20 tions, if any, together with drafts of legislation necessary to  
21 carry such recommendations into effect, by filing the same  
22 with the clerk of the house of representatives on or before the  
23 last Wednesday of December, nineteen hundred and sixty-  
24 nine.

Under the provisions of G.L. (Ter. Ed.) c. 220 sec. 8,

“Sheriffs, deputy sheriffs, constables and other officers shall serve all lawful processes issued by a court, judge, judicial officer of county commissioners legally directed to them.”

and under section 2 of c. 220 it is provided:—

“The courts of the commonwealth and the justices thereof shall have and exercise all the powers necessary for the performance of their duties. They may issue all writs, warrants and processes and make and award judgments, decrees, orders and injunctions necessary or proper to carry into effect the powers granted to them, and if no form for such writ or process is prescribed by statute, they shall frame one in conformity with the principles of law and the usual course of proceedings in the courts of the commonwealth.”

The type of writ which is most often used in the commonwealth is represented by the following issued by the Municipal Court of the City of Boston. A similar type of writ is used in our district courts. Virtually all contract and tort cases are begun with this form of writ:

## SAMPLE OF WRIT

### The Commonwealth of Massachusetts

SUFFOLK, SS.

SEAL  
OF THE  
COURT

*To the Sheriffs of our several Counties, or their Deputies,  
or any Constable of any City or Town within our said  
Commonwealth:*

....., GREETING.

WE COMMAND you to attach the goods or estate of .....  
CLARENCE C. CONSUMER  
1800 ELM STREET, BOSTON

.....  
of        BOSTON                      in our County of        SUFFOLK  
to the value of        SEVEN HUNDRED FIFTY                      Dollars:  
and summon        said defendant                      the said Defendant (if he  
may be found in your precinct) to appear                      before our Justices  
of the Municipal Court of the City of Boston, to be holden at Boston, within  
our County of Suffolk, for civil business, on Monday, the        second  
day of        February                      A.D., 1970 at nine o'clock in the forenoon;  
then and there to answer to        AGNEW FURNITURE CO. INC.  
in an action of        CONTRACT  
To the damage of the said Plaintiff, (as    he    it    says) the sum of  
                    FIVE HUNDRED        Dollars, as shall then and there appear, with  
other due damages.

.....  
And have you there this Writ with your doings therein.

WITNESS, ELIJAH ADLOW, Esquire, at Boston aforesaid, the  
thirty first        day of        December        , in the year of our Lord  
one thousand nine hundred and        sixty nine.

The direction to serve this writ on the defendant is given by the court to the Sheriff, Deputy Sheriffs, or Constables. The ancient procedure of having the sheriff take the body of the defendant and lock him up until he gave a bond still lingers in the printed writ although such a practice is long gone.

The writ is prepared by an attorney and delivered to the sheriff or a constable (if the claim is under the statutory amount) and it is the duty of the officer to make service on the defendant either by giving him a copy of the writ and a summons in his hand, or by leaving a copy at the last and usual place of abode of the defendant. There is of course no difficulty in understanding actual service in hand of the papers from the court, but there is considerable difficulty otherwise. A typical return of a writ by a deputy sheriff is as follows:

*Extra compensation will not be allowed unless the Officer's Return contains a bill of items, together with his affidavit.*

OFFICER'S RETURN.    SUFFOLK, SS.    BOSTON,    January 5, 1969

By virtue of this Writ, I this day attached a chip as the property of the within named defendant Clarence C. Consumer and afterward on the same day, I summoned him to appear and answer at court as within directed by leaving at his last and usual place of abode a summons of this writ.

Fees.—Attach.,		Said service was made at No. 1800 Elm
Service,	\$8.00	Street, Boston, Apartment No. 15, and in
Travel,	.50	this service it was necessary to use con-
Motor Vehicle	.75	veyance 5 miles one way.
	<hr/>	/s/ MATT DILLON
	\$9.25	DEPUTY SHERIFF

It can be understood from examining this specimen form that the summons is served "in hand" i.e. actually given to the defendant, or, as in this example, left at the last and usual place of abode of the defendant by the officer who makes a sworn record of his service. He can be summoned into court to testify that he made such service, and the circumstances of the act. He is also called on to make various kinds of attachments in connection with the service of the writ and summons, and the mails could not be used for such a purpose. It is also evident from this specimen that the cost of service is much higher than by registered mail. There is another type of service which indicates that the sheriff made a diligent search and did *not* find the defendant. The service of process becomes a part of the permanent record in the court.

## Rules of Court Regarding Service

There are many rules of court already which deal with the service of notices and citations of various kinds. No rule allows a suit to be commenced (except a small claim) by the use of the mails. There are many who would not be satisfied with substituted service by mailing even if a receipt was obtained. They argue that receipts are often improperly filled out and it is easy to claim that the signature is not genuine. It must also be recalled that a letter can be refused by the addressee, and this is not good service.

In *Ames v. Winsor*, (1837) XIX Pick. (36 Mass.) 247, Chief Justice Shaw discussed a 1797 law which provided that in cases where an attachment was made, the summons "shall be delivered to the party, or left at his or her dwellinghouse or place of last and usual abode" fourteen days before the return day. In holding that where the return of the sheriff showed that the summons was left at the dwelling or domicile of the defendant in Duxbury, Shaw said:—

"The law proceeds on the supposition, that at a man's dwellinghouse, or last *and* usual place of abode (for both must concur,) there will be some person enjoying his confidence, careful of his interests, and charged with his concerns, who will give him actual notice, and such service being the most likely to accomplish that object, the statute for many purposes, gives it the force and effect of actual notice. The law raises no such presumption, and the statute gives no such legal effect, to a notice left at another place. The law assumes that every man must have a domicile, or place of last and usual abode, within the State or out of it. If the former, the summons must be left at that place; if the latter, various provisions are made, adapted to various cases, and best calculated to insure actual notice to the defendant."

In this case it was declared that the court has no authority to proceed in a case where the defendant, purportedly lawfully served with process, comes before the court for the special purpose of showing lack of proper service.

Rule 3 of the Rules of the Superior Court permits notice by ordinary mail but this rule does not apply to the original process.

### **Superior Court Rule 3** **Giving of Notice**

*(Applicable to all cases)*

A notice to a party required by or given in pursuance of these rules, or any statute relative to procedure not requiring a different notice, shall be in writing, and, except as otherwise permitted by Rule 19, shall be given to such party or his attorney or any of his attorneys by delivering the same personally to him or by mailing the same, postage prepaid, to him at his business address or the address entered under Rule 19.

An affidavit of the person giving the notice shall be evidence thereof.

This rule shall not apply to original process or notice to bring a party before the court.

And Rule 8 of the rules of the Boston Municipal Court is substantially similar to the Rule 3 of the Superior Court above set forth. Rule 3 of the District Court rules is also in this form.

The court rule for the Small Claims<sup>1</sup> sessions of the District courts and the Boston Municipal court provides for service by registered or certified mail with a return receipt. The procedure is as follows:

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<sup>1</sup> Massachusetts presently allows the use of certified mail in small claims proceedings. See District Court Rule 49. Other states have allowed the use of registered or certified mail more generally. See, e.g. Illinois Smith-Hurd Ann. Stats. c. 110A. s. 284 and c. 110, s.13.2; Indiana Stats. Ann., Vol. 2, Part 1, Rule 1-1B; Maryland Ann. Code, Rule 104(b) (2); Nebraska Rev. Stats., S. 26-124 and 27-204; Ohio Rev. Code Ann. Sec. 2703.23. In New York, the statute provides for mailing *and* affixing whenever personal service cannot be made. See New York Civil Practice Law and Rules. S. 308(3). It should also be noted that the one extensive law review treatment of sewer service has recommended the use of certified mail as a remedy. See Abuse of Process: Sewer Service, 3 Colum. J. Law and Soc. Prob. 253 (1967).



## DISTRICT COURT RULES

### Rule 49

#### Notice to Defendant

The clerk shall mail to the defendant, at one or more of the addresses supplied by the plaintiff, as the clerk may deem necessary or proper, by registered or certified mail, return receipt requested, the expense being prepaid by the plaintiff, a notice signed by the clerk, bearing the seal of the court and bearing teste like a writ, which, after setting forth the name of the court, shall read substantially as follows:—

“To *(here insert name of defendant)*.

“*(Here insert name of plaintiff)* asks judgment in this court against you for *(here insert the amount claimed in dollars and cents)* upon the following claim *(here insert the nature of the claim as it appears on the docket; but no list of items need be included)*.

“The court will give a hearing upon this claim at *(here insert the location of the courthouse and the room therein, as may be necessary)* at *(here insert the hour)* o'clock in the *(here insert 'forenoon' or 'afternoon' as the case may be)* on *(here insert the date, including the day of the week, as may be prescribed by general or special order of the court)*.

“If you deny the claim, in whole or in part, you must, not later than *(here insert the date including the day of the week, of the second day before the day set for the hearing)*, personally or by attorney state to the clerk, orally or in writing, your full and specific defense to said claim, and you must also appear at the hearing. Unless you do both, judgment may be entered against you by default. If your defense is supported by witnesses, account books, receipts or other documents, you should produce them at the hearing. The clerk if requested will issue summonses without fee for witnesses.

“If you admit the claim, but desire time to pay, you must, not later than *(here insert the date, including the day of the week, of the second day before the day set for the hearing)*, personally, or by attorney state to the clerk, orally or in writing, that you desire time to pay, and you must also appear at the hearing and show your reasons for desiring time to pay.”

The notice to the defendant shall contain the following: “The court may order the amount found due to be paid in full or by installments and punish for contempt if the order is not obeyed.”

The clerk shall note in the docket the mailing date and address, the date of delivery shown by the return receipt and the name of the addressee or agent signing the receipt.

Notice shall be valid although refused by the defendant and therefore not delivered.

If the notice is returned undelivered, without refusal by the defendant, or if in any other way it appears that notice has not reached the defendant, the clerk shall issue, at the expense of the plaintiff, such other or further notice as the court may order.

In the Probate Courts and in the Land Court, there is wide use of registered and certified mail. In both cases, however, the original process of the court is still served by a deputy sheriff. In divorce actions, there must also be an identifying witness present at the time of service. Aside from the original service of process to bring a party into court, Rule 8 of the Superior Court gives that court wide authority to provide for notice to be given by mail even in the most important matters.

## **PROBATE COURT**

### **Rule 8**

## **FURTHER NOTICE**

If a notice, given in accordance with the forms approved as provided by General Laws Chapter 215, Section 30, or otherwise, is held by the judge to be insufficient, he may order such further notice as the case requires."

### **Statutory Background**

c. 215, § 30, referred to in the instant rule provides as follows:

"The judges of the Probate Courts or a majority of them shall from time to time make rules for regulating the practice and for conducting the business in their courts in all cases not expressly provided for by law and shall prescribe forms, and as soon as convenient after making or prescribing them shall submit a copy of their rules, forms, and course of proceedings to the Supreme Judicial Court, which may alter and amend them, and from time to time make such other rules and forms for regulating the proceedings in the Probate Court as it considers necessary in order to secure regularity and uniformity."

In addition, as to notices in Probate Courts it is provided:

"The Supreme Judicial Court and the Probate Courts shall make rules requiring notice of any hearing, motion or other proceeding before said courts to be given to parties interested or to the attorneys of record therefor," c. 215 §31.

It is also provided by statute as to service of citations that further service may be ordered.

It was held in *Attorney General v. Provident Inst. for Savings*, 201 Mass. 23, that the probate court did have power to make rules relating to notice but that the notice must be proper and in some cases must be personal notice.

### **Notice by Mail to Out of State Defendants**

Under the "Long Arm" statute, G.L. (Ter. Ed.) c. 273 A, various

types of service of process, including certified or registered mail, are permitted:—

§6. Mode of service outside commonwealth; proof of service

(a) When the law of the commonwealth authorizes service outside this commonwealth, the service, when reasonably calculated to give actual notice, may be made:

(1) by personal delivery in the manner prescribed for service within this commonwealth;

(2) in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requiring a signed receipt;

(4) as directed by the foreign authority in response to a letter rogatory; or

(5) as directed by the court.

(b) Proof of service outside this commonwealth may be made by affidavit of the individual who made the service or in the manner prescribed by the law of this commonwealth, the order pursuant to which the service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court.

§7. Individual making service outside commonwealth

Service outside this commonwealth may be made by an individual permitted to make service of process under the law of this commonwealth or under the law of the place in which the service is made or who is designated by a court of this commonwealth."

## Notice in Criminal Cases by Mail

In the field of criminal law, the General Court enacted c. 698 of the Acts of 1968 which allowed alternative service by mail of complaints having to do with "moving" violations. (See G.L. c. 276 s. 25). Previously in 1967 (Acts, 1967 c. 338), service by mail had been authorized for parking violations. The purpose of both of these statutes was to eliminate the need to have police officers serve such summonses and notices, and to free them for more worthwhile assignments.

## Non-Judicial Proceedings

In connection with notice by mail, we think it of interest to consider a recent decision of our Supreme Judicial Court which deals with the cancellation of automobile insurance by registered mail.

In *Canavan vs. The Hanover Insurance Company*, 1969 A.S. 873.

our Supreme Judicial Court had occasion to consider a case in which the Hanover Insurance Company attempted to cancel a policy by sending a notice by registered mail to the insured. The facts were as follows:—

“On March 5, 1963, Hanover mailed the policy to Graves at 35 D Street. On March 6 the envelope was returned marked, “No such number.” On March 14 Hanover again sent the policy in an envelope with the typed address 35 D Street. On March 15 this was returned, again with the marking, “No such number.” On April 2, 1963, Hanover sent a statutory notice of cancellation<sup>1</sup> giving as reasons, alleged impropriety of registration, unknown address, and failure to notify the company of change of address. This cancellation notice was sent to the insured at 35 D Street and on April 3 was returned, the marking once more being, “No such number.” The effective date of cancellation was stated as April 24. No notice of cancellation was received by Graves.

On April 29, 1963, the plaintiff, a pedestrian, was struck by the Pontiac sedan owned and operated by Graves. It is the judgment for that accident for which Hanover now refuses liability claiming that the policy was effectively cancelled on April 24.”

<sup>1</sup>NOTE: The statute says:—

“General Laws c. 175, §113A (2) as amended through St. 1956, c. 191, §1, provides in material part: [N]o cancellation of the policy . . . shall be valid unless written notice thereof is given by the party proposing cancellation to the other party giving the specific reason or reasons for such cancellation . . . at least twenty days . . . prior to the intended effective date . . . and . . . notice of cancellation sent by the company to the insured, by registered mail, postage prepaid, with a return receipt of the addressee requested, addressed to him at his residence or business address stated in the policy shall be a sufficient notice. . . .”

The court held that the cancellation was not effective and said (page 875):—

“The trial judge made these rulings. The mere sending of notice of cancellation to the insured by registered mail at the address stated in the policy without making any effort to ascertain the correctness of that address after it knew that the address was incorrect is ineffectual to cancel the policy.”

It should, therefore, be observed that mere mailing of a notice by registered mail cannot be a sufficient procedure in all cases where a serious right is involved.

From our discussion it can be seen that our courts have made rules concerning notice by registered, certified, and even ordinary mail where it appeared that this method was adequate to guarantee due process of law. The General Court can and often does specify, in the interest of fairness and justice, that certain types of notice shall be given. We are quite willing to endorse and recommend



the various amendments contained in Appendix A of House 5000, at which are set forth above under the heading of “An Act to Authorize Courts to Make Rules Providing for Service of Process by *registered* Mail”. We also recommend that in each instance in the bill, as it appears here, the words “or certified” be inserted after the word “registered” so that the courts will be clearly free to provide for certified mail as well as the more expensive registered mail.

We do not, by endorsing these proposals, necessarily recommend that service of process by the sheriffs and constables be eliminated or replaced (most particularly in the case of the original papers) by mail. Counsel and the parties may conclude that they want to be sure of service of the papers in the traditional manner. In many cases this method can never be replaced by the mailman.

**3. Special Justices Should Not be Authorized  
to Sit in the Superior Court**

**HOUSE . . . . (1969) . . . . No. 3691**

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AN ACT AUTHORIZING SPECIAL JUSTICES OF THE DISTRICT COURTS TO SIT IN THE SUPERIOR COURT ON MOTOR TORT CASES AND IN MISDEMEANOR SESSIONS IN CRIMINAL CASES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1       SECTION 1. Chapter 212 of the General Laws, as most re-
- 2       cently amended by chapter 810 of the acts of 1963, is hereby
- 3       further amended by striking out section 14B thereof and insert-
- 4       ing in place thereof the following section:—
- 5       *Section 14B.* A justice or special justice of the district courts,
- 6       including the municipal court of the city of Boston, shall at the
- 7       written request of the chief justice of the superior court, sit in
- 8       the superior court at the trial or disposition with or without a
- 9       jury in any part of the commonwealth of any motor vehicle
- 10      tort action, or of any violation of a by-law, order, ordinance,
- 11      rule or regulation made by a city or town or public officer, or of
- 12      any misdemeanor except libel, and during the continuance of
- 13      such request shall have and exercise all the powers and duties
- 14      which a justice of the superior court has and may exercise in
- 15      the trial and disposition of such cases.
- 16      No justice or special justice so sitting, shall act in a case in
- 17      which he has either sat or held an inquest in the district court
- 18      or otherwise has an interest. No justice or special justice of
- 19      the district courts shall so sit in the superior court, as aforesaid,

unless his name appears on a list submitted to the chief justice of the superior court for the purpose of this section by the chief justice of the district courts.

In the event that by reason of his physical or mental disability, death, resignation, retirement or removal any justice or special justice, presiding at a trial pursuant to this section shall fail to sign or return exceptions taken at the trial, to make a report after he has reserved the case for report to the supreme judicial court, to enter a verdict or finding after reserving leave, with the assent of the jury, to do so, to set aside the verdict in a civil action and order a new trial, for a cause for which a new trial may by law be granted, or otherwise to exercise any of the powers and duties granted to him by this section in the disposition of such case, the chief justice of the superior court may assign any other justice or special justice authorized to sit in the superior court pursuant to this section, or any justice of the superior court, to have and exercise such powers and duties.

The chief justice of the superior court may arrange for the holding of such sessions for the trial and disposition of cases under the provisions of this section and for the attendance of such numbers of jurors therefor as the interests of justice and the prompt disposition of such cases may in his judgment require. Such sessions may be held simultaneously with other sessions of the superior court or at other times in the discretion of the chief justice.

SECTION 2. Chapter five hundred and thirty-five of the acts of nineteen hundred and sixty-one, as amended, is hereby repealed, except that any justice sitting in the superior court pursuant to said chapter five hundred and thirty-five, as amended, at the trial of any case prior to the effective date of this act, shall continue thereafter, upon assignment by the chief justice of the superior court, to have and exercise all the powers and duties granted to him by said chapter five hundred and thirty-five, as amended, in the disposition of such case.

SECTION 3. Said chapter 212 of the General Laws is hereby further amended by striking out section 14D, inserted by section 1 of chapter 210 of the acts of 1949, and inserting in place thereof the following section:—

*Section 14D.* When a justice or special justice of a district court sits in the superior court as above provided, the fact of his holding court and the request of the chief justice of the superior court shall be entered upon the general records of the court, but need not be stated in the record of any case heard.

SECTION 4. Said chapter 212 of the General Laws is hereby further amended by striking out section 14E, as most recently amended, and inserting in place thereof, the following section:—

SECTION 14E. A justice or special justice of a district court when sitting in the superior court, as provided by section four-

6     teen B, shall receive from the commonwealth, in addition to his  
7     regular salary, upon certificate of the chief justice of the supe-  
8     rior court, the amount of expense incurred by him in the dis-  
9     charge of his duties in connection with such sessions and also  
10    such compensation for each court day, while so sitting, as will,  
11    when added to the per diem rate of his regular salary; computed  
12    as provided in section eighty-four of chapter two hundred and  
13    eighteen, amount to seventy-five dollars a day.

Under the present law, Chapter 212 Section 148, a special justice of the district courts or the Boston Municipal Court cannot be requested by the chief justice of the Superior Court to sit in that court for the trial or disposition of motor vehicle tort cases, or violations of by-laws, or for the misdemeanor sessions.

This amendment would permit the chief justice of the Superior Court to invite special justices to sit in the Superior Court for such judicial business.

This is regressive legislation.

The Special Commission of Chapter 158 of the Resolves of 1963 which made a report (House (1964) 3450) entitled "Report of the Special Commission Relative to the Special Justices of the District Courts and Certain Related Matters" made a very pointed criticism of special justices in which it was said:

"The theory of a part time judge and a part-time lawyer, which might have been acceptable at the turn of the century or during the horse and buggy period of our development, has proved an enigma to the people of this generation. This unique condition is without parallel in modern government and its correction should be made forthwith. We cannot in good conscience further condone this conflict of interest, which is abhorrent to our standard of morality."

The same special commission took a poll in which 5,272 lawyers participated. Of this number 4,472 lawyers opposed part-time lawyer judges and favored the trend towards full time district court judges. Some 611 lawyers were content to maintain the existing system. The others failed to make a significant choice, or did not receive the ballot.

The above criticism, admitting of little doubt was not so strongly applied by other members of this special commission who filed an informal dissenting minority report. In the minority report, however, there were suggestions for the gradual phasing out of part-time special justices and as persons now holding such appointments retire or pass on, the suggestion was that their places be left vacant. Another dissenting member said:—

"The problem, again, is not a new problem and many suggestions have been made by the Judicial Council and others looking to the day when this Commonwealth would have only a full-time judiciary."

Another dissenter said:—

“The suggestion that we should eliminate part-time justices is endorsed by practically every member of the Bar, and the very idea of having a man having a dual capacity of judge and lawyer is disapproved by the public. . . .”

The commonwealth is committed to a full time district court system and is embarked on a firm and gradual shift in that direction. It is no reflection on any special justice to say that our legal system has outlived the usefulness of the part-time judge.

There appear to be eighty-one special justices in the commonwealth. Apart from this group there are some eighteen district courts where the regular judge is able to despatch the business with reasonable speed. Of this panel of eighteen, only thirteen have been requested to sit in the superior court under the present statute. Only ten have actually sat there.

We oppose this legislation. Nothing should be put forth which would unnecessarily prolong the part-time judge-part-time lawyer in this commonwealth. Our recommendations over the years, and the suggestions made by many others interested in the administration of justice, have finally led the General Court to put the district courts on the road to a full-time institution. Changes are always needed, and there will be more, we are sure. We can not support legislation which will turn us in another direction. There would be no particular financial benefit if this bill were enacted. The present panel of full-time district court judges is not being utilized as fully as it might be.

#### **4. District Court Judges Sitting in Superior Court Should Be Authorized to Sit in Gaming Cases under Chapter 271, Sections 7 and 17**

Our attention has been called to that under the Acts of 1968, chapters 115 and 116, the penalty for certain gaming offenses was increased. The maximum penalty under c. 271 Sec. 7 for setting up or promoting a lottery, and for other defined offenses is:—

“by a fine of not more than three thousand dollars or by imprisonment in the state prison for not more than three years, or jail or the house of correction for not more than two and one half years.”

There is a like penalty under Section 17 of Ch. 271 for buying and selling pools or registering bets “upon the result of a trial or contest of skill, speed or endurance of man, beast, bird, or machine” and related offenses.

Until 1968 the penalty for these offenses had been a fine of not



more than two thousand dollars or by imprisonment for not more than one year.

We do not criticize the increased penalty, but by imposing a more substantial penalty the offense becomes a felony.

Under the provisions of G.L. (Ter. Ed.) Ch. 212 Sec. 14 B, a district court judge may, at the written request of the chief justice of the superior court, sit in the superior court at the trial or disposition with or without a jury in any part of the commonwealth of:—

- (1) any motor vehicle tort action;
- (2) any violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer;
- (3) any misdemeanor except libel.

As these gaming offenses were misdemeanors prior to 1968, the district court judge could sit on such cases if assigned to the superior court. This can no longer be done as Ch. 212 Sec. 14 B does not permit it.

It is possible, however, under the provisions of G.L. (Ter. Ed.) Ch. 221 Sec. 26, as amended by the Acts of 1969, Ch. 496, for a district court judge to sit on the same type of gaming cases in the district court since by that statute the jurisdiction of the district court extends to:—

“ . . . all felonies punishable by imprisonment in the state prison for not more than five years. . . .”

among other things. This phraseology includes offenses under Ch. 271 Sec. 7 and Sec. 17. The sentence could not exceed two and one half years, however.

We conclude that it would be useful to amend Chapter 212 Section 14 B to allow a district court judge sitting in the superior court to hear these gambling cases involving the two sections mentioned.

We therefore recommend the following draft act.

## 1970 DRAFT ACT

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 212 of the General Laws is hereby amended by inserting after
- 2 the word “misdemeanor” in the first sentence the words: “or any offense
- 3 described in Section 7 or Section 17 of Chapter 271,”

## 5. REVISION OF CIVIL PROCEDURE

### The Demise of Contributory Negligence

On January 1, 1971 a significant change will become effective in

Massachusetts in the settlement and trial of cases and in particular automobile tort cases. The rule has been stated as follows:

**c. 231 Sec. 85 Contributory Negligence Affirmative Defence; Presumption and Burden of Proof.—**

"In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defence to be set up in the answer and proved by the defendant."

This statute, which has been in effect since 1914, is repealed, by Chapter 761 of the Acts of 1969 effective January 1, 1971.

The new statute which replaces section 85 of chapter 231 reads as follows:

**Comparative Negligence**

**Acts (1969)                      Ch. 761                      (G.L. c. 231 §85)**

AN ACT LIMITING THE EFFECT OF CONTRIBUTORY NEGLIGENCE AS A DEFENSE AND ESTABLISHING THE DOCTRINE OF COMPARATIVE NEGLIGENCE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 231 of the General Laws is hereby amended by striking out section 85 and inserting in place thereof the following section:—

*Section 85.* Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

In any such action the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict, which shall state:

(1) the amount of the damages which would have been recoverable if there had been no contributory negligence; and

(2) the degree of negligence of each party, expressed as a percentage.

Upon such findings of fact or the return of such a special verdict by the jury, the court shall reduce the amount of the damages in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made; provided, however, that if said propor-

tion is equal to or greater than the negligence of the person against whom recovery is sought, then, in such event, the court shall enter judgment for the defendant.

SECTION 2. This act shall take effect on January first, nineteen hundred and seventy-one, and shall apply only to causes of action arising on or after said date.

Because of its universal application and because it is a significant change in our procedure, it is most necessary for the bench and bar to take pains to understand the doctrine of comparative negligence. This doctrine is said to have originated in admiralty law. It is a rule which permits a damaged plaintiff to recover from a negligent defendant even though the plaintiff himself may have been guilty of some causal negligence. The present Massachusetts rule will bar the plaintiff because of his contributory negligence, but under the new rule his recovery will be diminished in proportion to the amount of his negligence.

The new Massachusetts statute follows the "Equal to or Greater Than" rule set forth in Sec. 895.045 of the Wisconsin Statutes Annotated. The language of the Wisconsin statute is identical with the *first paragraph* of the new Section 85 of Chapter 231.

It was decided in Wisconsin that the comparative negligence statute does not permit recovery by a plaintiff who was 50% negligent, *Rosenow v. Schmidt* (1939) 232 Wis 1, (285 N.W. 755).

There are three main types of comparative negligence rule:

1. **The equal to or greater than rule:**

(Arkansas, Georgia, Maine and Wisconsin; with Hawaii, Minnesota and New Hampshire, as well as Massachusetts soon to follow)

The plaintiff cannot recover if his negligence is equal to or greater than that of the defendant.

2. **The slight negligence rule:**

(Nebraska and North Dakota)

The plaintiff can not recover if his negligence is more than slight.

3. **The pure comparative negligence rule:**

(Mississippi only)

The plaintiff may recover regardless of his own contributory negligence but the amount of his recovery is diminished by the percentage of his negligence.

Under the equal to or greater than rule in Wisconsin, it is for the defendant to show by a preponderance of the evidence that the plaintiff's negligence is equal to or greater than that of the defendant.

It will take time for the Massachusetts law to develop.

The new Massachusetts statute requires the submission of questions to the jury and the return of a special verdict; or in the dis-

strict court a finding of fact by the judge. These special findings are to specify the amount of damage recoverable if the plaintiff had not been guilty of “*contributory negligence*” and the percentage of negligence of each party. The judge is then to reduce the amount of damages to which the plaintiff is entitled by the percentage attributable to him. If this percentage is 50% or more, the judgments must be for the defendant.

In Wisconsin a series of special verdict forms and questions has been developed by the Wisconsin Board of Circuit Judges and its Civil Jury Instruction Committee. It would be useful for our Massachusetts courts to make a detailed study of the Wisconsin procedures as our new statute is modeled almost completely on the practices existing in Wisconsin. The Wisconsin procedure also requires the jury to make a finding as to what would be 100% of the damages; and to assess the percentage (*as well as the specific acts*) of negligence on the part of defendant and plaintiff. The total damages are to be expressed by the jury under the heading of (a) personal injuries (b) medical and hospital expense, (c) loss of earnings to date (d) damage to the automobile, (e) future medical expense, (f) future loss of earnings, (g) future disability, and other damage as specified.

We urge the bench and bar to give this matter the consideration which it demands. Our comments are intended to raise a few of the myriad of problems that will arise. We trust that all concerned will appreciate the compelling necessity to become fully informed on the doctrine of comparative negligence.

6. Unauthorized Use of Photographs

HOUSE . . . . (1969) . . . . No. 2248

AN ACT THAT PROVISION BE MADE FOR INJUNCTIVE RELIEF FOR THE UNAUTHORIZED USE OF THE NAME, PORTRAIT OR PICTURE OF A PERSON.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 214 of the General Laws is hereby amended by
- 2 inserting after section 3 the following section:—
- 3 Section 3A. Any person whose name, portrait or picture is
- 4 used within the commonwealth for advertising purposes or
- 5 for the purposes of trade without written consent may bring a
- 6 bill of equity in the superior court against the person, firm or
- 7 corporation so using his name, portrait or picture, to prevent
- 8 and restrain the use thereof; and may also sue and recover



9 damages for any injuries sustained by reason of such use and  
10 if the defendant shall have knowingly used such person's  
11 name, portrait or picture in such manner as is forbidden or  
12 unlawful, the court, in its discretion, may award exemplary  
13 damages. Nothing contained in this section shall be so  
14 construed as to prevent any person, firm or corporation,  
15 practicing the profession of photography, from exhibiting in  
16 or about his or its establishment specimens of the work of  
17 such establishment, unless the same is continued by such  
18 person, firm or corporation after written notice objecting  
19 thereto has been given by the person portrayed; and nothing  
20 contained in this section shall be so construed as to prevent  
22 any person, firm or corporation from using the name, portrait  
22 or picture of any manufacturer or dealer in connection with  
23 the goods, wares and merchandise manufactured, produced or  
24 dealt in by him which he has sold or disposed of with such  
25 name, portrait or picture used in connection therewith; or  
26 from using the name, portrait or picture of any author,  
27 composer or artist in connection with his literary, musical or  
28 artistic productions which he has sold or disposed of with  
29 such name, portrait or picture used in connection therewith.

The Judicial Council made a report on a bill almost exactly similar to House (1969) 2248 in 1953 at page 23 of its Twenty-Ninth Report.

At that time, we did not recommend the bill in this form, but we did recommend the following draft act:—

#### DRAFT ACT OF 1953

Chapter 214 of the General Laws is hereby amended by inserting after Section 1 the following Section 1A.

“The Supreme Judicial and Superior Court shall have original and concurrent jurisdiction under the general principles of equity jurisprudence to protect with or without damages the equitable interest of personality sometimes called ‘the right of privacy’ of a person against unreasonable and serious interference with such person’s interest in not having his affairs known to others or his likeness exhibited to the public.”

In 1966, our Supreme Judicial Court decided the case *Brauer vs. The Globe Newspaper Company*, 351 Mass. 53. This was a libel suit as well as a suit brought for the alleged invasion of privacy. The plaintiff was a seven-year-old boy whose picture was taken by a photographer for the Boston Globe in 1962 when the Globe was conducting a “Globe Santa” series to attempt to raise money for needy people at Christmas time. The picture was published and an interview was also published. No particular objection was made in 1962, but in 1965, about two years after the first publication,

the same photograph was published in the *Globe* with the caption which read "Help for the Mentally Retarded". There was no doubt that some mistake had been made since the plaintiff was not mentally retarded. Passing over the libel aspects of the case, the court pointed out that one of the plaintiff's claims was based on an alleged invasion of the right of privacy. The court said:—

"As yet, no case has determined that there exists in this Commonwealth, a legally protected right of privacy. See *Themo v. New England Newspaper Publishing Co.* 306 Mass. 54, 58; *Kelley vs. Post Publishing Company*, 327 Mass. 275; *Frick vs. Boyd*, 350 Mass. 259. However, while carefully preserving the question whether such a right exists, these decisions have set forth some of the boundaries within which the right, if recognized, would be actionable."

Our Supreme Court said that the plaintiff in the *Brauer* case sought to bring his lawsuit within a group of decisions from other jurisdictions which now are recognized as holding that "publicity which places the plaintiff in a false light in the public eye" is actionable as an invasion of his right of privacy.

In the *Brauer* case the court made a distinction saying that the plaintiff was not necessarily cast in a false light in the public eye by publicity. The court did not find that there were any acts which familiarized the public with either the name, likeness, or other means of identifying the plaintiff. The court also said the plaintiff's picture was recognized only by a small group of intimates. This, said the Supreme Judicial Court, "falls short of the kind of publicity upon which an action for the invasion of privacy, if acknowledged to exist, would have to be based."

There is a statement in the Restatement of Torts of the American Law Institute to the effect that a person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other. (Vol. 4 Section 867).

In our discussion of this subject in 1953 in our Twenty-Ninth Report at page 26, we noted that there was then no decision recognizing a right of privacy nor was there any decision denying such a right. We said then that Massachusetts is therefore in a position to declare and establish a right and at the same time establish the procedure to protect it and guard it from abuse. At that time, we recommended the establishment of privacy as a purely equitable right within the "general principles of equity jurisprudence."

We said that this right to privacy should be protected, with or without damages, exclusively in equity in accordance with established equitable procedure. To accomplish that result we submitted the draft act in 1953 which is set forth above.

The case of *Frick v. Boyd*, 350 Mass. 259 was decided in February

of 1966. This was an equity action in which the plaintiff sought an injunction against the distribution of the book entitled "*Adventures In Sharing*". The petitioner was able to restrain the distribution of the book temporarily, and the judge of the Superior Court stated that the existence of the so-called right of privacy in Massachusetts had not then as yet been determined. He asked our Supreme Court to determine whether such a common-law right of privacy existed and if it did exist, what were the elements of, and defenses to, a cause of action for invading the right of privacy; and whether or not in the case of *Frick vs. Boyd*, the facts showed the invasion of such a right? The book "*Adventures In Sharing*" was not in any sense an adverse comment on the life of the petitioner, Miss Frick. It was not even a true commercial venture for profit and the conclusion was that the publication would not pay its own expenses.

Miss Frick, herself, acknowledged that the book was not defamatory. The court let this case pass from its jurisdiction without deciding very much in regard to the right of privacy. It did say, however, that if there was any such right, it was not infringed in this particular case. In the *Frick* case at page 264 the court says:

"It will be time enough to appraise these authorities and to deal with difficult questions presented by the assertion of such a right, (of privacy) when and if we are confronted with some substantial, serious, or indecent intrusion upon the private life of another. This inoffensive book presents no such situation."

A collection of legal authorities in regard to the right of privacy can be found in 350 Mass. 259, at 264.

## Recommendations of the Judicial Council

We recommend the enactment of this bill, House (1969) 2248. The proposed legislation does not extend the equity power of the court, by specific statute, as far as we suggested in 1953. It does not allow the equity court, by injunction or otherwise, (including damages) to protect the so called "right of privacy" under all circumstances. We suggested the broader power in 1953.

The extent to which the "right of privacy" should be protected is clearly a matter of legislative policy. The 1969 bill deals only with the unauthorized and unjustifiable use of the "name, portrait or picture" of a person "*for advertising purposes or for the purposes of trade.*"

We point out that the larger question of the right of privacy is still unsettled. If it shall be the intent of the General Court to enact legislation to protect the "right of privacy" a more comprehensive bill such as we suggested in 1953 will have to be reported out.

## 7. Exemptions for Property Seized on Executions

HOUSE . . . . (1969) . . . . No. 3488

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AN ACT EXEMPTING CERTAIN PROPERTY FROM EXECUTION.

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*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 235 of the General Laws is hereby amended by strik-  
2 ing out section 34 and inserting in place thereof the following  
3 section:—

4 *Section 34.* The following property of the debtor shall be  
5 exempt from seizure on execution:

6 First, The necessary wearing apparel of himself and of his  
7 wife and children: one bedstead, bed and the necessary bedding  
8 for every two persons of the family; one heating unit used for  
9 warming the dwelling house, and fuel not exceeding the value of  
10 fifty dollars procured and intended for the use of the family.

11 Second, Other household furniture necessary for him and his  
12 family, not exceeding three thousand dollars in value.

13 Third, The bibles, school books and library, used by him or  
14 his family, not exceeding two hundred dollars in value.

15 Fourth, Two cows, twelve sheep, two swine and four tons of  
16 hay.

17 Fifth, Tools, implements and fixtures necessary for carrying  
18 on his trade or business, not exceeding five hundred dollars in  
19 value.

20 Sixth, Materials and stock designed and procured by him and  
21 necessary for carrying on his trade or business, and intended to  
22 be used or wrought therein, not exceeding five hundred dollars  
23 in value.

24 Seventh, Provisions necessary and procured and intended for  
25 the use of the family, not exceeding three hundred dollars in  
26 value.

27 Eighth, One pew occupied by him or his family in a house of  
28 public worship; but this provision shall not prevent the sale of a  
29 pew for the non-payment of a tax legally laid thereon.

30 Ninth, Boats, fishing tackle and nets of fishermen actually  
31 used by them in the prosecution of their business not exceeding  
32 five hundred dollars in value.

33 Tenth, The uniform of an officer or soldier in the militia and  
34 the arms and accoutrements required by law to be kept by him.

35 Eleventh, Rights of burial and tombs while in use as reposi-  
36 tories for the dead.

37 Twelfth, One sewing machine, in actual use by each debtor or  
38 by his family, not exceeding two hundred dollars in value.

39 Thirteenth, Share in co-operative associations subject to chap-



- 40     ter one hundred and fifty-seven not exceeding one hundred dollars  
41     in value in the aggregate.  
42     Fourteenth, Estates of homestead as defined in chapter one  
43     hundred and eighty-eight of the General Laws.

This bill deals with property which is exempt by statute from seizure upon execution of a judgment of the court. Certain property has traditionally been exempt from seizure to satisfy an execution.

It would appear to us that the proposed legislation is such that we can say it is merely a modernization of the existing state of things, and a realistic approach to the problem of inflation.

To demonstrate this situation we would point out that presently household furniture is exempt up to the maximum limit of \$1,000 whereas House 3488 of 1969 increases this limit to \$3,000. In the same way, the amount of tools that are exempt are increased from \$100 to \$500. The number of animals which are now exempt from seizure is doubled.

We recommend this bill as an updating of the present statute, and point out that it does not really change the intent of long-existing statute law. This bill virtually takes into account the toll of inflation. The furniture one could have acquired a quarter century or more ago cannot be acquired now for less than double that sum or more.

## Table showing exemptions available where property is subject to seizure to satisfy a judgment of the court.

WHAT IS EXEMPT	PRESENT LIMIT c.235 Sec. 34	PROPOSED LIMIT House (1969) 3488
1. Necessary wearing apparel of himself, wife, and children, one bedstead, bed and necessary bedding for every two persons of family, one iron stove used for warming the dwelling house, and fuel intended for the use of the family.	1 iron stove fuel not to exceed \$20	1 heating unit Fuel—\$50
2. Other household furniture necessary for him and his family.	Not to exceed \$1,000	Not to exceed \$3,000
3. Bibles, school books and library, used by him or his family.	\$50	\$200
4. Cow, sheep, swine, and hay.	1 cow 6 sheep 1 swine 2 tons of hay	2 cows 12 sheep 2 swine 4 tons of hay
5. Tools, implements and fixtures necessary for carrying on his trade.	\$100	\$500
6. Materials and stock designed and procured by him and necessary for carrying on his trade or business, and intended to be used or wrought therein.	\$100	\$500
7. Provisions necessary and procured and intended for the use of the family.	\$50	\$300
8. One pew occupied by him or his family in a house of public worship, but this provision shall not prevent the sale of a pew for the non-payment of a tax legally laid thereon.	Same	Same
9. Boats, fishing tackle and nets of fishermen actually used by them in the prosecution of their business.	\$100	\$500
10. The uniform of an officer or soldier in the militia and the arms and accoutrements required by law to be kept by him.	Same	Same
11. Rights of burial and tombs while in use as repositories for the dead.	Same	Same
12. One sewing machine in actual use by each debtor or by his family.	\$100	\$200
13. Shares in co-operative associations subject to Chapter 157	\$20	\$100
14. Estates of homestead as defined in C 188.	Same	Same

## 8. Change in Rule 72 of the Superior Court

### SUPERIOR COURT RULES

#### Rule 72 (Amended in 1969)

##### Taking of Exceptions

*(Applicable to all cases)*

No exception shall be allowed to any opinion, ruling, direction or judgment made in the presence of counsel, unless it be taken at the time such opinion, ruling, direction or judgment is given. Exceptions to a charge to the jury shall be taken before the jury are sent out. When further instructions, rulings or directions are given in the absence of counsel after the jury have been sent out, exceptions thereto shall be taken within twenty-four hours thereafter. Exceptions to any other opinion, ruling, direction or judgment made in the absence of counsel shall be taken by a writing filed with the clerk within seven days after the receipt from the clerk of notice thereof.

During the course of the year, the Judicial Council requested the Committee on Rules of the Superior Court to change Rule 72 so as to permit the filing of exceptions within seven days after receiving notice from the clerk instead of three days.

We were advised by Justice Lewis Goldberg that the Rules Committee had made this suggested revision on October 31, 1969.

Rule 72 now has been amended to extend the three day period to seven days.

## 9. Confidential Communications

### HOUSE . . . . (1969) . . . . No. 4956

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AN ACT TO PROTECT CONFIDENTIAL COMMUNICATIONS OF PERSONS ADDICTED TO THE EXCESSIVE USE OF ALCOHOLIC BEVERAGES AND BEING TREATED IN ALCOHOLIC CLINICS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Section 4C of chapter 111 of the General Laws, as
- 2 amended by section 4 of chapter 715 of the acts of 1956,
- 3 is hereby further amended by adding the following para-
- 4 graph:—
- 5 Information or records concerning any applicant for admis-
- 6 sion under the provisions of this section to hospital and
- 7 clinic facilities established under section four B and any

8 communications, and in this section communications shall  
9 include conversations, correspondence, actions and occur-  
10 rences relating to diagnosis or treatment before, during or  
11 after institutionalization, regardless of the patient's aware-  
12 ness of such conversations, correspondence, actions and occur-  
13 rences, and any records, memoranda or notes of the fore-  
14 going, shall be confidential and for the exclusive use and in-  
15 formation of the said hospital or clinic facilities in the dis-  
16 charge of their duties and shall not be disclosed without the  
17 consent of the applicant and patient.

Section 4 of Chapter 111 of the General Laws now reads as follows:

§4C. Admissions to hospitals and clinics for persons addicted to alcoholic beverages.

Any person who through the excessive use of alcoholic beverages has become unable to care for himself, his family, or his property, or has become a burden on the public, may voluntarily request admission to the hospital and clinic facilities established under section four B. Admissions to such hospital and clinic facilities may also be made on recommendation by a physician, by the courts, social agencies, families or friends of such person, or may be made on application for temporary care as provided in section eighty of chapter one hundred and twenty-three of the General Laws, or for voluntary admission as provided in section eighty-six of said chapter one hundred and twenty-three. All admissions under this section shall be voluntary on the part of the patient and subject to the approval of the department or its authorized agents. Added St.1950, c. 800, as amended St.1956, c. 715, §4.

In our Forty-Third Report for 1967 at page 108 we discussed the necessity for protecting the confidential communications made to psychiatrists and psychotherapists.

We determined that the word psychotherapist included not only psychologists, but social case workers, psychiatric social workers, marriage counsellors and other persons engaged in "very human relations".

In our discussion in the Forty-Third Report, we made it very clear that we did not recommend the extension of the privileged communications to anyone but the psychiatrists.

By Chapter 418 of the Acts of 1968, the word "psychotherapist" is defined as a "person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry."

It was by this act that the privileged communication doctrine was extended to the psychiatrist. (See: G.L. Ter. ed. Chapter 233 Section 20 B).

The proposed statute House (1969) 4956 would extend the privileged communication idea to the same class of persons who were



excluded from the privilege under Chapter 233 Section 20 B, and the class which we recommend not be covered by the privilege.

We again express our opinion that this class of persons should not be included in any statute establishing a privileged communication.

There is no privilege existing between the doctor and patient in the ordinary case.

While we are in favor of legislation which deals with the rehabilitation of alcoholics, we do not believe that there is any sound reason to establish a special privileged communication for the victims of alcoholism.

On the basis of what we said in our Forty-Third Report, we do not recommend this bill.

## II. PROBATE COURT PROCEDURES AND PRACTICE

1. District Courts Should Not Attempt to Enforce Probate Decrees.
2. No Attempt Should be Made to Limit Remarriage of Divorced Parties by the Prohibition of Such Marriages.
3. A Judge of Probate Cannot Forbid Directly the Enjoyment of Vested Rights in Property Held in Joint Ownership.
4. The Proposed Statutory Trustees Powers Act is Not Recommended as a Guide for the Prudent Man.
5. What Share Should the Widow Take? One Third or Two Thirds?

### 1. District Courts Should Not Enforce Probate Decrees

HOUSE . . . . (1969) . . . . No. 1650

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AN ACT PROVIDING FOR ENFORCEMENT IN THE DISTRICT COURTS OF CERTAIN ORDERS  
AND DECREES OF THE PROBATE COURTS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       SECTION 1. Chapter 208 of the General Laws is hereby  
2 amended by inserting after section 37 the following sec-  
3 tion:—

4       Section 37A. Upon the entry of a decree or order by a judge  
5 of a probate court providing for alimony or an annual  
6 allowance for the wife or children, the register of the probate  
7 court shall forthwith transmit a certified copy of such decree  
8 or order to the probation officer of the district court having  
9 jurisdiction over the person required by said decree or order  
10 to pay such alimony, annual allowance, and such payments  
11 shall thereupon be made to said probation officer under such  
12 terms and conditions as may be provided in said decree or  
13 order.

1       SECTION 2. Chapter 209 of the General Laws is hereby  
2 amended by inserting after section 37 the following sec-  
3 tion:—

4       Section 37A. Upon the entry of a decree or order of the  
5 probate court, providing for payments to be made under the  
6 provisions of sections thirty-two or thirty-seven, the register

7 of the probate court shall forthwith transmit a certified copy  
8 of such decree or order to the probation officer of the district  
9 court having jurisdiction over the person required by said  
10 decree or order to make such payments, and such payments  
11 shall thereupon be made to said probation officer under such  
12 terms and conditions as may be provided in said decree or  
13 order.

1 SECTION 3. Chapter 273 of the General Laws is hereby  
2 amended by inserting after section 5 the following sec-  
3 tion:—

4 *Section 5A.* The probation officer shall pay over payments  
5 received by him pursuant to the decree or order of a probate  
6 court under section thirty-seven A of chapter two hundred  
7 and eight or section thirty-seven A of chapter two hundred  
8 and nine, in accordance with the terms and conditions  
9 provided in said decree or order. Violation of such decree or  
10 order by the person required thereby to make such payments  
11 may be punished as for a contempt by the district court  
12 having jurisdiction over such person.

By ACTS, 1969. — CHAP. 771 probation officers have now been provided in the probate courts. Additional duties have been assigned to the probate court probation officers as follows:—

SECTION 3. Said chapter 276 is hereby further amended by inserting after section 85 the following two sections:—

*Section 85A.* In addition to other duties imposed upon him by the justices of the probate court, a probation officer of the probate court may, when ordered to do so by the court, examine all records and files in divorce, legal separation, annulment, custody and paternity cases in which orders or decrees have been entered to ascertain whether the persons to whom payments of money should have been made regularly received the various and definite amounts provided for in the orders or decrees of the court and, where there are dependent minor children, that the same are applied for the support, maintenance, education and betterment of said dependent minor children, and that said dependent minor children are properly cared for by their custodian. Said officers shall bring into court when necessary, by citation or otherwise, all persons who are delinquent in making payments ordered or decreed by the court and shall ascertain in the case of dependent minor children whether they are receiving proper maintenance and education and whether they are liable to become public charges.

*Section 85B.* Said probation officer shall have full power, by citation or other order duly issued by the probate court, to compel the attendance of witnesses to take testimony and do each and everything necessary, including initiating contempt proceedings, to collect any and all delinquent payments due to any person entitled under order or decree of said court to receive payments, to make recommendations to the probate court, where there are dependent minor children, for the better-

ment of the conditions of said dependent minor children and to ascertain when requested to do so by the court the moral and general conditions surrounding said dependent minor children and shall report the result of such findings to said court.

There is no necessity to act on House (1969) 1650 as the problem has been solved by Acts, 1969, Chapter 771 authorizing the appointment of probation officers in the Probate Courts and specifying the duties which are set forth in the new Section 85 A which was added to Chapter 276 of the General Laws. We would not have recommended the bill for the reasons given in our 41st report at page 62 in 1965. We are gratified that the General Court has now provided for probation officers in the probate courts as we recommended this in the report last mentioned.

No legislation is required.

## 2. Remarriage of Divorced Persons

### HOUSE . . . . (1969) . . . . No. 3493

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#### AN ACT LIMITING THE REMARRIAGE OF DIVORCED PARTIES.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 208 of the General Laws is hereby amended by in-  
2 serting after section 24A the following four sections:—

3 *Section 24B.* After a decree of divorce has become absolute,  
4 either party may marry again as if the other were dead except  
5 that any party having minor issue of a prior marriage not in his  
6 custody and which he is under obligation to support by any  
7 court decree or judgment, may not remarry in this common-  
8 wealth without the order of any judge of the superior court,  
9 judge of a probate court or a presiding judge of a district court;  
10 the court granting said permission to remarry shall be in that  
11 county having jurisdiction over the libel for divorce, in that  
12 county in which such minor issue resides or in that county where  
13 the marriage license application is made. No marriage license  
14 shall be issued to any such party except upon court order. The  
15 permission to remarry may be sought by petition and may be  
16 heard by the court in an ex parte hearing provided that personal  
17 service of a copy of said petition has been made upon the person,  
18 agency or institution having custody of said minor issue at least  
19 five days prior to said hearing. The moving party shall be re-  
20 quired to submit proof of his compliance with such prior court  
21 decree or judgment, and no order shall be entered on behalf of



the moving party, or hearing held, unless the person, agency, institution or other entity having the legal or actual custody of such minor issue appear except that such appearance or notice may be waived by the court upon good cause shown. The moving party shall also make service of a copy of said petition to any agency or institution providing any form of public or private assistance to said minor issue in the same manner as that notice which is to be given to the person, agency, institution or other entity having custody of said minor issue. Upon the hearing, if said person submits such proof and makes a showing that such children are not and are not likely to become public charges, the court shall grant such order, a copy of which shall be filed in any prior divorce action of such person in this commonwealth affected thereby; otherwise, permission for a license to remarry shall be withheld until such proof is submitted and such showing is made. Any order made denying said license may be appealed by the moving party. No city or town clerk in this commonwealth shall issue a license to marry to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said city or town clerk.

*Section 24C.* No nonresident of this commonwealth having minor issue of a prior marriage not in his custody and which he is under obligation to support by order or judgment of any court in this state or elsewhere, may marry in this commonwealth unless he has complied with all of the requirements of the preceding section.

*Section 24D.* If a resident of this commonwealth having such support obligations of a minor as set forth in section twenty-four B of this chapter wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under section twenty-four B of this chapter, except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within five days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

*Section 24E.* This section shall have extraterritorial effect outside the commonwealth; and sections twenty-four B and twenty-four C of this chapter are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

The purpose of this bill is to provide that a father who has been divorced cannot remarry unless he can show that he is capable of supporting his children, if any, who are in the custody of his divorced wife. A hearing would be held before this divorced father

could obtain a marriage license, and at such hearing he would have to show that the children were not likely to become public charges, that is, dependent upon the welfare for their support. Under the provisions of this bill, it is, of course, possible that there would be some instances where the wife would find herself in the situation which we have just described, but for the most part, it would apply to the male spouse only.

By other provisions of this bill, non-residents would be bound to the same obligation if they came into this Commonwealth to marry; and if a resident of the Commonwealth who was under an order for support of children, went out of state to marry, he would also be bound to show that he could support a new family.

There is little doubt that a father under orders of the Probate Court to contribute to the support of children by a former marriage may find it difficult to assume the burden of supporting a new family as well. Some multi-married husbands seem to feel that the fact that they have more than one set of children is an excuse why they should not support one group which came into being as a result of a former marriage.

It appears to us that this bill would encourage illegitimacy. It might be difficult for a person to prove that he can support any number of children. Unless he could make such proof, his marriage license would be denied him. If a divorced person seeks to be remarried, it does not necessarily follow that he will produce another brood of children. And it does not follow that if he should be able to show that he was capable of supporting his present children, his condition might change in the future and he might be rendered incapable of supporting two families at some time in the future.

### **3. Can the Judge Force the Husband or Wife to Leave the House?**

## **SENATE . . . . (1969) . . . . No. 671**

AN ACT PERMITTING A JUDGE OF PROBATE TO ORDER A HUSBAND OR WIFE TO VACATE THE MARITAL HOME.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 208 of the General Laws is hereby amended by
- 2 inserting after Section 34A the following section:—
- 3 *Section 34B.* Any court having jurisdiction of libels for
- 4 divorce, or for nullity of marriage or of separate support or

5 maintenance, may, upon filing of said libel or petition, and  
6 during the pendency thereof, order the husband or wife to  
7 vacate forthwith the marital home for a period not exceeding  
8 sixty days, provided the court finds, after a hearing ex parte,  
9 that the health, safety or welfare of the petitioner or libellant  
10 and/or the minor children of the parties would be improved  
11 thereby.

When a marriage has deteriorated badly and one of the parties is brought to the point of filing a petition for separate support, the question often arises as to what can be done to prevent the obstreperous husband (or wife) from remaining in the marital home.

It is often the case that the home is owned jointly, as tenants by the entirety, or in some cases, by the husband alone. It is rarer to find that the wife is the owner of the marital home. In rented property, the lease may be in the name of the husband and wife, or either of them. With leases it is more difficult to lay down any general statement. Experience leads us to say that the vast majority of cases involve the efforts of the wife to make the husband leave. In some instances, the husband simply refuses to go; and because he may be the owner, and the person in control of the premises, the judge of the probate court lacks the power to order him out of his own home directly.

Because direct action may not be possible, it does not follow that there is no practical method by which the husband may be forced to leave the premises where he is possibly affecting the health and welfare of his wife or his children or both. The common methods of dealing with this is to advise the husband at a hearing that if he insists upon staying in the marital home, the judge will make an order requiring the husband to pay rent on suitable premises to be occupied by the wife and children. If the husband is faced with this decision, the almost inevitable result is that he moves out of the marital home; and seeks less expensive quarters for himself for the time being. Eventually, and if a divorce results, there is either a property settlement or the rights of the parties are adjusted by virtue of a decree of divorce which makes them tenants in common of the real estate. Upon this event, the property can be sold either with the cooperation of both parties, or in the last analysis, by order of the court.

A temporary support order can be obtained very quickly in the probate court.

Because we feel that a practical method now exists for dealing with the problems which are the subject of this bill and because we do not think that any legislation is presently necessary, we do not recommend this bill.

## Summary of the Legal Problems Involved in Legislation Governing Property Rights by Husband and Wife

There is the necessity to view all aspects of any new social legislation. We append this brief summary of applicable law.

In *MacNeil v. MacNeil*, 312 Mass. 183, the court said at page 185:—

"It is settled that a tenancy by the entirety 'confers upon the husband rights paramount to those of his spouse under which during his life and the continuance of the marital relationship he is entitled to possession and control of the granted premises, together with the use and the profits therefrom.' *Franz v. Franz*, 308 Mass. 262, 265. *Voight v. Voight*, 252 Mass. 582. *Cunningham v. Ganley*, 267 Mass. 375. *Peter v. Sacker*, 271 Mass. 383. It follows that the plaintiff was entitled to injunctive relief restraining the defendant from interfering in any way with his complete rights of possession and control of the entire property."

Tenancy by the entirety is, of course, the most common form of real property ownership among married persons in Massachusetts. One reason for this is that such property is exempt from inheritance tax in the usual case.

Under *Goldman v. Finkel* 341, Mass. 492, it was held that even where a husband purchased real estate so that the title was held by him and his wife as tenants by the entirety, it could not be said that it was his sole property even where he had paid all of the consideration and made the mortgage payments.

In some instances, property is held by husband and wife as tenants in common. In other cases, a husband and wife can be joint tenants. It is interesting to note that the tenancy by the entirety is the only tenancy which cannot be terminated by the act of one spouse.

In *Giles v. Giles* 279, Mass. 469 at page 471, the court said:—

"This is a libel for divorce by a wife against her husband on the ground of cruel and abusive treatment. The parties were married on September 27, 1927; they were each about sixty years of age, both had been previously married, and the libellant had a son by a former marriage, but the parties had no children by this marriage. They lived together in Cambridge and Medford in this Commonwealth, and while so living in Medford they occupied a house owned by them jointly as tenants by the entirety.

Although at common law the right to possession of the house during the joint lives of the husband and wife is in the husband, *Voight v. Voight*, 252 Mass. 582, *Licker v. Gluskin*, 265 Mass. 403, she was rightfully occupying it with him during coverture including the period from November 26, 1930, until December 8, 1930, when she moved out. No question respecting the husband's right of possession is involved here. There



is no evidence or contention that there was any resumption of marital relations between the parties after November 26, 1930, the last time that he attempted to strike her."

The above three types of tenancy would cover at least 80% (by estimate) of all residential property occupied by family groups, exclusive of leaseholds or rented quarters.

The remaining 20% would consist of property owned either by the husband or the wife alone.

As to property which is leased or rented, it is impossible to decide what the breakdown might be. If the husband is the tenant either by lease or by agreement with the landlord, he is the person in control of the leased premises. It might develop that the greater percentage of property occupied by family units in rental housing was under the control of the husband, or the husband and wife as persons in joint control. It would rarely be the case that the wife would be in absolute control of the leased premises.

On the basis of the foregoing, it would seem logical to come to the conclusion that:—

1. Under a tenancy by the entirety, the husband is in exclusive legal control of a disrupted marital domicile.
2. Under a tenancy at common or a joint tenancy, the husband is in practical control until the wife decides to take some action to terminate such a tenancy. Since no one will purchase only a half interest in a residence, things remain static when marital difficulties arise even though the wife could legally convey a half interest.
3. The problem in rental housing is not quite so acute, but if the husband insists upon remaining, and if he holds the lease or is the legal tenant, his property right and his obligation of contract are legally protected interests and can not be swept away.

After a divorce the tenancy by the entirety becomes a tenancy in common, and the interests are usually sold by agreement. In extreme cause the court can direct the disposition of the property and partition under Chapter 241 is one alternative.

In the case of a decree of separate support under Chapter 209, Section 32 or a decree allowing living apart for justifiable cause (Section 36) the property interests of the parties do not change. The tenancy by the entirety, with the husband in control, would thus continue unless the parties agreed otherwise.

## 4. Statutory Powers for all Trustees?

### A Possible Trap for the Unwary

SENATE . . . . (1969) . . . . No. 1319

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#### AN ACT ESTABLISHING STATUTORY TRUSTEES POWERS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 The General Laws are hereby amended by inserting after  
2 Chapter 203 the following chapter:

#### 3 CHAPTER 203 A.

#### 4 STATUTORY TRUSTEES POWERS ACT

5 *Section 1.* As used in this chapter: — (a) “trust” means an  
6 express trust created by a trust instrument, including a will,  
7 whereby a trustee has the duty to administer a trust asset  
8 for the benefit of a named or otherwise described income or  
9 principal beneficiary, or both; “trust” does not include a re-  
10 sulting or constructive trust, a business trust which provides  
11 for certificates to be issued to the beneficiary, an investment  
12 trust, a voting trust, a security instrument, a trust created by  
13 the judgment or decree of a court, a liquidation trust, or a  
14 trust for the primary purpose of paying dividends, interests,  
15 interest coupons, salaries, wages, pensions or profits, or em-  
16 ployee benefits of any kind, an instrument wherein a person  
17 is nominee or escrowee for another, a trust created in de-  
18 posits in any financial institution, or other trust the nature  
19 of which does not admit of general trust administration; (b)  
20 “trustee” means an original, added, or successor trustee;

21 *Section 2.* A trustee has, in addition to his common law and  
22 other statutory powers conferred upon him by the trust in-  
23 strument, all powers conferred upon him by this chapter to  
24 the extent that they are not inconsistent with the language  
25 in the trust instrument. Such powers will continue until the  
26 final distribution of the assets of the trust.

27 *Section 3.* An instrument which is not a trust as defined in  
28 Section 1 may incorporate any power in this chapter by refer-  
29 ence.

30 *Section 4.* A trustee has the power, a) To receive additions  
31 to the assets of the trust. b) To retain, invest, and reinvest  
32 trust assets in accordance with the Prudent Man Rule as  
33 stated and interpreted by the Supreme Judicial Court of the  
34 Commonwealth of Massachusetts. (c) To sell, to exchange, to  
35 lease, and to make contracts concerning real or personal prop-  
36 erty for cash or credit, which leases and contracts may extend

beyond the term of the trust; to give or take options; to execute deeds, transfers, mortgages, leases and other instruments of any kind. d) To give or receive general or special proxies or powers of attorney for voting or acting in respect of shares or securities, which may or may not be discretionary and with the power of substitution; to deposit shares or securities with or transfer them to, protective committees' voting trustees or similar bodies; to join in any reorganization; and to pay assessments or subscriptions called for in connection with shares or securities held by the trustee. e) To distribute trust property in cash or in kind or partly in each. f) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the trustee deems the claim to be uncollectible.

*Section 5.* With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

*Section 6.* Except as specifically provided in the trust, the provisions of this chapter apply to any intervivos trust established after the effective date of this chapter and any trust in a will or codicil of a person dying after said effective date.

*Section 7.* If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

*Section 8.* This act shall become effective \_\_\_\_\_ days after its enactment.

## The Present Statutes

Chapters 203 and 203A of the General Laws deal with the subject of trusts which are rights of property, real or personal, held by one party for the benefit of another.

Within the framework of Chapter 203 the General Court has enacted statutes from time to time which deal only with the basic elements of trusts.

Chapter 203 does not cover the entire trust picture in all of its many aspects. It merely supplements the common law and the decisions of the Supreme Judicial Court on trust matters.

The proposed bill, Senate (1969) 1319, is a measure which attempts to codify many of the non-statutory rules applicable to trusts and trustees.

Section 4 of the proposed bill would establish certain trustee powers by statute. This section 4 also attempts to give statutory recognition to the "Prudent-Man Rule".

By reference to the statute proposed, certain administrative powers and other powers could be incorporated into the trust instrument by reference.

We do not recommend this bill. By Chapter 417 of the Acts of 1969, the Uniform Common Trust Fund Act was given the designation as Chapter 203A. This present bill is not restricted to common trust funds so it should have nothing to do with Chapter 203A. We have communicated again with some of the leading experts in the trust business at the Old Colony Trust Company, the State Street Bank, and the New England Merchants National Bank. We have also discussed the matter with others who are knowledgeable in the field. If there is one comment which seems common to all of these people, it is that statutory aids to draftsmanship of trust instruments should be viewed with caution because the unwary draftsman may overlook the existence of a statutory power for a trust or a trustee which should have been expressly eliminated or qualified in the trust instrument so that unforeseen tax or other disadvantages will be headed off.

In 1968 we commented on a proposed Uniform Principal and Income Act in our annual report at page 87. We made the remark then which we think bears repeating:—

"Trust administration is not an exact science like chemistry or physics. While useful and reasonable rules are in effect, and are generally followed, there are many gray areas where exact and precise definitions are not possible at the time decisions must be made. Good faith, among other things, is always a factor in a disputed situation."

Massachusetts has long followed the so-called "prudent-man rule" which is referred to in Section 4, Line 32 of Senate (1969) 1319.

### **The Prudent-Man Rule**

In *Harvard College and Massachusetts General Hospital v. Francis and Jonathan Amory*, decided in 1830, X Pick 446, J. & F. Amory were left a sum of \$50,000:—



"in trust nevertheless . . . to invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion, hereby enjoining on them particular care and attention in the choice of funds and in the punctual collection of the dividends, interest and profits thereof, and authorizing them to sell out, reinvest and change the said loans and stocks from time to time, as the safety and interest of said trust fund may in their judgment require."

These trustees were not required to give bond and it was provided that:

"they shall not be held responsible for the acts, doings and defaults of each other, but shall simply be accountable respectively each for his own acts, doings and defaults as such trustees."

Harvard and Massachusetts General, ultimate beneficiaries of the trust fund, objected to certain losses sustained by reason of the investment of the trust funds in the stock of two textile manufacturing companies. The charitable organizations also claimed the whole of certain dividends when the trustees had treated part as a return of principal; and the charities made a claim that certain insurance stocks had been improperly dealt with. At no time was the integrity of J. and F. Amory involved, it was their business judgment which caused the complaint.

Most lawyers who deal with trust matters are familiar with this case, or they should be. It was the first judicial attempt to lay down rules to govern the conduct of trustees. It may amaze some to know that in Massachusetts it was once common for the trustee to mingle trust funds with personal assets. Today this sort of thing would be horrendous. The famous and oft quoted rule of the case was:—

"All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested."

The definition of the word "trust" in Senate (1969) 1319 is inappropriate. It has been suggested that a "trust" should be defined as "any express trust of property, created by a will, deed, or other instrument whereby there is imposed on a trustee the duty to administer property for the benefit of a named or otherwise described income or principal beneficiary or both."

If it was necessary to exclude certain types of trusts, as indicated by lines 9-20, it is difficult to understand why a pension or profit-sharing or employee benefit trust should be excluded.

When and if a proper statutory trustees' powers act is proposed, this part of the act will need drastic revision.

Section 2 is not appropriate for all trusts, nor is it very clear as to what other statutory powers would be conferred upon a trustee by the "trust instrument". Section 3 does not appear to be a useful provision. In regard to Section 4, it appears to give a set of administrative powers to the trustee which could be incorporated by reference to this statute. In this report, we have set forth what we believe to be a fairly representative standard set of administrative provisions for trustees.

In preparing a trust instrument, it is not enough to introduce a standard set of administrative provisions. A draftsman must be sure that the so-called standards or conventional set of rules is applicable in the given case. It would also be true that if a standard set of rules was made to apply, certain problems might arise unless the draftsmanship was very carefully done.

It is also important to consider, in the case of many trusts, the necessity to draft the document to give the maximum tax saving advantages permitted under the Internal Revenue Code.

A trust which is very appropriate for one person may not be legally sound as a vehicle for the management of the affairs of another. Anyone who contemplates the creation of a trust should select the individual or corporate trustee with great care and should consult a competent lawyer in order to draft a trust declaration or will which will be appropriate for the instant case. A trust which saves thousands in taxes may bring undying grief to a family. A trust which is drawn to save taxes for a wife would be unsuitable for a brother, or a child.

To give an indication of the type of comprehensive trustees powers which many skilled attorneys might adapt to a particular case following a detailed inquiry into the business and family background of the person seeking to make a trust or will, we have included here a specimen of administrative powers. "Boiler-plate" provisions or "standard" clauses, like dynamite, can cause untold damage and a great mess unless the responsibility for proper adaptation is placed in the hands of a skilled professional adviser who has nothing to sell but his time and professional ability.

The following clauses, which are included in many trusts, give an indication of how little is really accomplished by the proposed bill. We are *not* recommending the enactment of the specimen provisions but merely setting them out for the information of the General Court and other parties who may be interested. No legislation is presently needed, and the bill proposed would not be helpful.

## **Standard Administrative Provisions for a Trustee**

To the extent that administrative provisions could be made stand-

ard (and this may not be advisable in all cases) the following are suggested as *standard* administrative provisions for an inter vivos trust. Because of tax consequences, and where other considerations apply, *standard* provisions can not be used in all cases.

FIRST: The Trustee shall have, in addition to those conferred by law or otherwise, the following discretionary powers, privileges and exemptions:

(a) To administer, invest, and reinvest the trust fund in any property, including real and personal property, stocks, bonds, and other securities, investment companies and common trust funds (without the necessity of notice to beneficiaries), in any state or jurisdiction, and whether or not of a kind or in a proportion ordinarily considered suitable for trust investments. To make secured or unsecured loans and, with respect to mortgages and other security held by the trust, to modify the terms thereof, to release partially, to foreclose and to purchase at foreclosure sales. To permit all or any part of the trust property to be held in the custody of a banking institution or brokerage house.

(b) To participate in any reorganization, recapitalization, merger or similar transaction; to give proxies or powers of attorney with or without power of substitution for voting upon any shares or certificates of interest belonging to the trust.

(c) To manage real property in such manner as the Trustee shall deem best, including authority to erect, alter, or demolish buildings, to improve, repair, insure, subdivide and vacate any of said property; to adjust boundaries, to dedicate streets or other ways for public use without compensation; to impose such easements, restrictions, conditions, stipulations and covenants as the Trustee may see fit; to lease for such terms and on such terms as the Trustee deems advisable and whether or not the lease may extend beyond the term of the trust.

(d) To sell at public or private sale, and to exchange or partition all or any part of the property held by the trust, without order or license from any court, and to execute any and all deeds and other instruments necessary or appropriate therefor, with or without covenants, warranties and representations.

(e) To borrow money from the Trustee individually or from others upon such terms and conditions as the Trustee deems advisable and to mortgage and pledge trust assets as security for the repayment thereof.

(f) To carry stock certificates and other property of the trust in the form of street certificates or in the name of a nominee or any person, including its own, or in any other form, without disclosing the existence of any trust.

(g) To hold separate trusts or any share of a trust in one or more consolidated funds in which the separate trusts or shares shall have undivided interests. On any division or distribution of the trust property, to make the same in cash or in kind or partly in each at such values as the Trustee determines to be reasonable.

(h) To make any payment or distribution directly to any beneficiary whether or not competent or to apply the same for his benefit and in the

case of a minor to deposit the same in a savings bank in his name or to invest the same in a custodianship or trust for his benefit.

(i) To determine in accordance with reasonable accounting practice what shall belong and be chargeable to principal and what shall belong and be chargeable to income, and in making that determination the Trustee may employ an accountant or attorney-at-law and rely upon his opinion; provided, however, that all capital gains distributions from investment companies shall be treated as principal. To amortize or refrain from amortizing premiums on securities purchased at more than par.

(j) To retain such reserves out of income as the Trustee deems proper for expenses, taxes, depreciation and other liabilities of the trust.

(k) To settle by compromise or arbitration or otherwise any and all claims and demands in favor of or against or in any way relating to the trust property upon such terms as the Trustee deems advisable.

(l) To hold life insurance policies without any obligation for the payment of premiums or any obligation to take any action towards the collection of the proceeds unless indemnified against loss or expense occasioned thereby. No insurance company need see to the application of any amount paid by it to the Trustee and a receipt by the Trustee shall be a full discharge of the insurance company with respect to such payment.

It is the Donor's intention to give the Trustee wide discretion in matters of management of the trust property and the foregoing enumeration of powers is not intended to exclude other powers reasonably incidental to such management.

SECOND: No person to whom any interest is given, whether in income or principal, shall have power to anticipate, alienate, dispose of or encumber such interest or income by anticipation or to subject the same to his debts or liabilities, and no such interest or income shall be liable for his debts or liabilities.

THIRD: Nondiscretionary payments of income shall be made at least as frequently as quarterly. All accumulated and accrued income of a deceased income beneficiary which has not been paid over prior to his death shall be treated as income for the next successive estate.

FOURTH: Any interest in the trust property may be disclaimed in whole or in part by an instrument in writing signed by the beneficiary thereof and delivered to the Trustee, and in such event the interest so disclaimed shall be disposed of as though said beneficiary were not living.

FIFTH: Any Trustee may at any time resign as Trustee or disclaim or release any power in whole or in part by an instrument in writing, duly signed, acknowledged before a notary public and delivered to any Co-Trustee, and if none, to my beneficiary. Said disclaimer or release may be for such period of time as such Trustee may specify without in any way affecting the continuance of the power in any other Trustee.

SIXTH: At any time during which there is more than one Trustee, a Trustee may from time to time delegate in writing the power to sign checks and the custody of the trust fund to a Co-Trustee for such period or periods



of time as he may determine, and other powers and discretions may be delegated for periods not exceeding one year at a time; provided, however, that any powers or discretions withheld from any Trustee by the terms of this Declaration of Trust shall not be delegated to such Trustee under this Article.

SEVENTH: Pending the qualification of any Successor Trustee, the Trustee then in office shall have all the powers, discretions and exemptions given to the Trustees.

EIGHTH: No Trustee shall be required to give bond or furnish surety on any bond required by law.

NINTH: No Trustee shall be liable for, nor unless requested in writing by a beneficiary shall be obliged to inquire into, the acts or omissions of any Co-Trustee, any prior Trustee or any person administering the Donor's estate.

TENTH: If this Declaration of Trust is recorded in a Registry of Deeds, any amendment, revocation, resignation, appointment, acceptance of trust, or other instrument may, but need not, be recorded in said Registry.

ELEVENTH: A written statement of any Trustee at any time as to any facts relative to the trust may always be relied upon and shall always be conclusive evidence in favor of any transfer agent and any other person dealing in good faith with the Trustee in reliance upon such statement.

TWELFTH: The Trustee shall render accounts of the administration of the trust annually, except no such account shall be required during the Donor's lifetime unless requested in writing by him or by his guardian or conservator. The assent by all the persons who, for the period of any account, were entitled or eligible to receive the income of the trust and on the last day of the accounting would have been entitled to receive the principal of the trust if it had then terminated and who were of full age and legal capacity (but if under guardianship or conservatorship, then by his guardian or conservator, or if deceased, by his Executor or Administrator), shall make such account, in the absence of fraud or manifest error, binding and conclusive upon all persons then having or who may thereafter have any interest, vested or contingent, in the income or principal of the trust estate. The failure of any such person to object to any such account by a writing mailed to the Trustee within sixty days of the receipt of a copy of the account shall be deemed to be an assent by such person.

THIRTEENTH: The trustee may accept additions to the trust from sources other than the estate of the decedent or the settler of the trust.

FOURTEENTH: The trustee shall have the authority to employ any bank or trust company incorporated in this commonwealth, any national bank located in this commonwealth, and any other state-chartered bank which may have trust powers, as custodian of any securities held as a fiduciary and the cost thereof, except in the case of a corporate fiduciary, shall be a charge upon the trust.

FIFTEENTH: In the case of the survivor of two or more trustees hereunder, such survivor may continue to administer the property of the trust

without the appointment of a successor trustee who has ceased to act and to exercise or perform all the powers given to the original trustee unless such action shall be contrary to an express provision of the trust. The trustees shall have the authority, under appropriate circumstances, to hold the property of two or more trusts or parts of such trusts created by the same instrument as an undivided whole without separation as between such trusts or parts, provided that such separate trusts or parts shall have undivided interests and provided further that no such holding shall defer the vesting of any estate in possession or otherwise.

**5. What Share Should a Widow Take? One Third? or Two Thirds?**

**HOUSE . . . . (1969) . . . . No. 347**

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**AN ACT INCREASING A SPOUSE’S SHARE OF PROPERTY NOT DISPOSED OF BY WILL.**

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 190 of the General Laws is hereby amended by  
2 striking out section 1, as recently amended by section 1 of  
3 chapter 316 of the acts of 1956, and inserting in place thereof  
4 the following:—

5 *Section 1.* Spouse’s share of property not disposed of by  
6 will. A surviving husband or wife shall, after the payment of  
7 the debts of the deceased and the charges of his last sickness  
8 and funeral and of the settlement of his estate, and subject to  
9 chapter one hundred and ninety-six be entitled to the follow-  
10 ing share in his real and personal property not disposed of by  
11 will:

12 (1) If the deceased leaves kindred and no issue, and it  
13 appears on determination by the probate court, as hereinafter  
14 provided, that the whole estate does not exceed fifty thousand  
15 dollars in value, the surviving husband or wife shall take the  
16 whole thereof; otherwise such survivor shall take fifty thou-  
17 sand dollars and two thirds of the remaining personal and  
18 two thirds of the remaining real property. If the personal  
19 property is insufficient to pay said fifty thousand dollars, the  
20 deficiency shall, upon the petition of any party in interest, be  
21 paid from the sale or mortgage, in the manner provided for  
22 the payment of debts or legacies, of any interest of the  
23 deceased in real property which he could have conveyed at  
24 the time of his death; and the surviving husband or wife shall  
25 be permitted, subject to the approval of the court, to pur-  
26 chase at such sale, notwithstanding the fact that he or she is

27 the administrator of the estate of the deceased person. A  
28 further sale or mortgage of any real estate of the deceased  
29 may later be made to provide for any deficiency still remain-  
30 ing. Whenever it shall appear, upon petition to the probate  
31 court of any party in interest, and after such notice as the  
32 court shall order, and after a hearing thereon, that the whole  
33 amount of the estate of the deceased, as found by the  
34 inventory and upon such other evidence as the court shall  
35 deem necessary, does not exceed the sum of fifty thousand  
36 dollars over and above the amount necessary to pay the debts  
37 and charge of administration, the court shall itself by decree  
38 determine the value of said estate, which decree shall be  
39 binding upon all parties. If additional property is later  
40 discovered, the right or title to the estate covered by such  
41 decree shall not be affected thereby, but the court may make  
42 such further orders and decrees as are necessary to effect the  
43 distribution herein provided for.

44 (2) If the deceased leaves issue, the survivor shall take  
45 fifty thousand dollars and two thirds of the remaining per-  
46 sonal and two thirds of the remaining real property.

47 (3) If the deceased leaves no issue and no kindred, the  
48 survivor shall take the whole.

The proposed act would change the law which applies when either the husband or wife dies with property not disposed of by a will. The present statute prefers the surviving spouse over relatives where there has been no issue surviving. In 1945 the share of the surviving spouse was increased from \$5,000 to \$10,000; and in 1956, to \$25,000. The proposal can be analyzed as follows:—

PRESENT LAW	PROPOSED LAW
a. If the deceased leaves kindred and no issue, and the estate does not exceed \$25,000, the surviving husband or wife shall take the whole.	If the deceased leaves kindred and no issue, and the estate does not exceed \$50,000, the surviving husband or wife shall take the whole.
b. If the deceased leaves kindred and no issue, and the estate exceeds \$25,000, the survivor shall take \$25,000 and 1/2 of personal and 1/2 of real property.	If the deceased leaves kindred and no issue, and the estate does exceed \$50,000, the survivor shall take \$50,000 and 2/3 personal and 2/3 real property.
c. If the deceased leaves issue, the survivor shall take 1/3 of personal and 1/3 of real property.	If the deceased leaves issue, the survivor shall take \$50,000 and 2/3 of remaining real and personal property.
d. If the deceased leaves no issue and no kindred the survivor shall take the whole.	If the deceased leaves no issue and no kindred, the survivor shall take the whole.

So far as the proposed legislation would increase the amount from \$25,000 to \$50,000 where there has been no surviving issue, and so far as the proposed legislation would increase the share of the surviving spouse from  $1/2$  to  $2/3$  of the real and personal property where there has been no issue, we recommend the bill.

The great question involved here is whether or not the General Court wishes to change the law so that the surviving wife or husband will take  $2/3$  and the issue only  $1/3$ . Under the present law, if a man dies leaving a surviving wife and two children, the widow takes  $1/3$  and each of the two children take  $1/3$ , where the property has not been disposed of by a will.

This is in accordance with the present provisions of Chapter 190, Section 1 (2) which reads:—

“If the deceased leaves issue, the surviving shall take  $1/3$  of the personal and  $1/3$  of the real property.”

In House (1969) 347 the amended section would read:

“If the deceased leaves issue, the survivor shall take \$50,000 and  $2/3$  of the remaining personal and  $2/3$  of the remaining real property.”

We have no hesitancy in increasing the monetary limits now set forth in Chapter 190, Section 1. If for no other reason than inflation, such limits are not now realistic although they may have been in 1956. The proposed change in Section 2 which gives the widow  $2/3$  and the children  $1/3$  is a matter of legislative policy. It should be studied well before the  $1/3$ - $2/3$  rule is reversed in favor of the wife.



III. CORRECTIVE LEGISLATION

- 1. Increase in the Homestead Exemption
- 2. Technical Change in Small Loans Law

1. Increase in the Homestead Exemption

HOUSE . . . . (1969) . . . . No. 1240

---

AN ACT INCREASING HOMESTEAD EXEMPTIONS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1       SECTION 1. Chapter 188 of the General Laws is hereby  
2       amended by striking out section 1, as most recently amended  
3       by section 1 of chapter 32 of the acts of 1939, and inserting in  
4       place thereof the following section:—  
5       Section 1. A householder who has a family shall be en-  
6       titled to acquire an estate of homestead to the extent of ten  
7       thousand dollars in value in the land and buildings thereon  
8       owned or rightly possessed by lease or otherwise and occupied  
9       by him as a residence; and such estate shall be exempt from  
10      the laws of conveyance, descent and devise and from attach-  
11      ment, levy on execution and sale for the payment of his debts  
12      or legacies, except—  
13      (1) Sale for taxes.  
14      (2) Attachment, levy and sale in the following cases:  
15      (a) For a debt contracted previous to the acquisition of  
16      said estate of homestead.  
17      (b) For a debt contracted for the purchase thereof.  
18      (c) Upon an execution issued from the probate court to  
19      enforce its decree that a husband pay a certain amount weekly  
20      or otherwise to support his wife or minor children.  
21      (d) Where buildings on land not owned by the householder  
22      are attached, levied upon or sold for the ground rent of the lot  
23      of land whereon they stand.

1       SECTION 2. Said chapter 188 is hereby further amended by  
2       striking out the first sentence of section 9, as most recently  
3       amended by section 2 of said chapter 32, and inserting in place  
4       thereof the following sentence:—If the property of a debtor  
5       is assigned under the laws relative to insolvent debtors, and  
6       such debtor claims, and it appears to the court wherein the  
7       proceedings in insolvency are pending, that he is entitled to

8 hold a part thereof as a homestead and that the property in  
9 which such estate of homestead exists is of greater value than  
10 ten thousand dollars, the court shall cause the property to be  
11 appraised by three disinterested appraisers, one of whom shall  
12 be appointed by the insolvent, one by the assignee and the  
13 third by the court; or if either the assignee or insolvent  
14 neglects to appoint the court shall appoint for him.

1 SECTION 3. Chapter 236 of the General Laws is hereby  
2 amended by striking out section 18, as most recently amended  
3 by section 4 of said chapter 32, and inserting in place thereof  
4 the following section:—

5 *Section 13.* If a judgment creditor requires an execution  
6 to be levied on property which is claimed by the debtor to be  
7 as a homestead exempt from such levy, and if the officer hold-  
8 ing such execution is of opinion that the premises are of  
9 greater value than ten thousand dollars, appraisers shall be  
10 appointed to appraise the property in the manner provided by  
11 section six. If, in the judgment of the appraisers, the premises  
12 are of greater value than ten thousand dollars, they shall set  
13 off to the judgment debtor so much of the premises, including  
14 the dwelling house, in whole or in part, as shall appear to  
15 them to be of the value of ten thousand dollars; and the resi-  
16 due of the property shall be levied upon and disposed of in like  
17 manner as land not exempt from levy on execution; and if the  
18 property levied on is subject to a mortgage, it may be set off  
19 or sold subject to the mortgage and to the state of homestead,  
20 in like manner as land subject to a mortgage only.

The nature of the homestead estate is something which is little understood in these days. Writing in 1959 in the annual survey of Massachusetts Law, Cornelius J. Moynihan and Frederick B. Daly said "Estates of homestead no longer serve any purpose so no one claims such a state and the law of homestead is a dead letter."

At the present time, any estate of homestead is limited to \$4,000 in value of land and buildings. It may be acquired by a "householder" who has a family. In order to acquire an estate as a homestead, it must appear that such is the interest conveyed by the deed. If the homestead estate is not set forth in the deed, it must be declared by the claimant in a document duly signed, sealed and acknowledged and recorded in the Registry of Deeds. In rare cases this procedure is followed in modern times, but it is not customary any longer. It has been held, however, that this estate exists until the coming of age of the youngest child and the death of a widow. *Drettun v. Fox*, 100 Mass. 234 (1868). Without attempting to set forth a dissertation on the subject of homesteads, then we merely note that it is an estate which is exempt from execution for the payment of debts of the person who claimed or acquired the estate.

It is also exempt from dissent and devise and from attachment for the payment of debts and legacies of the persons claiming homestead. The exceptions to this are in Section 1 of Chapter 188.

This bill increases the homestead estate from \$4,000 to \$10,000. Again we see that inflation has reared its ugly head for it is obvious that an estate in homestead many years ago up to the limit of \$4,000 quite possibly is only equivalent of the same estate up to the limit of \$10,000 in these times. If we are to maintain the homestead estate, there is no reason why we should not increase the limit of the exemption to \$10,000. For this purpose, therefore, we recommend House 1240 without necessarily passing upon the desirability of the homestead estate.

## HOMESTEAD AGAIN

### HOUSE . . . . (1969) . . . . No. 1644

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AN ACT INCREASING THE AMOUNT OF EXEMPTION ALLOWED BY LAW TO OWNERS OF ESTATES OF HOMESTEAD.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 188 of the General Laws, as appearing in section 1
- 2 of chapter 32 of the acts off 1939, is hereby amended by
- 3 striking out, in line 3, the words "four thousand" and
- 4 inserting in place thereof the words:—twelve thousand.

This bill would increase the homestead exemption to \$12,000 rather than the \$10,000 we have already recommended in connection with House (1969) 1240.

We do not recommend this bill. We have commented on House (1969) 1240 and have recommended it. Further consideration of House (1969) 1644 is unnecessary in view of the more comprehensive provisions of House 1240. A ten thousand dollar limit is a fair one.

## 2. Technical Change in Small Loans Law

### HOUSE . . . . (1969) . . . . No. 1249

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AN ACT TO CONFIRM CERTAIN PROVISIONS OF THE SMALL LOANS LAW TO THE UNIFORM COMMERCIAL CODE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 140 of the General Laws is hereby amended by  
2 striking out section 107, as presently existing, and by sub-  
3 stituting therefor the following section:—

4 *Section 107.* If a loan to which sections ninety-six to one  
5 hundred eleven, inclusive apply is secured by a security  
6 interest or pledge of personal property or by an assignment  
7 of wages, the security interest, unless it secures future ad-  
8 vances, shall be discharged, the pledge restored or the assign-  
9 ment released upon payment or tender of the amount legally  
10 due under said sections. If such security interest secures  
11 future advances, it need not be discharged except at the  
12 borrower's written request and shall be discharged upon  
13 such request unless such future advances have been made.  
14 Such payment or tender may be made by the debtor, by  
15 any person duly authorized by him, or by any person having  
16 an interest in the property subject to the security interest  
17 pledged or in the wages assigned. Whoever refuses or neglects  
18 to discharge a security interest as aforesaid, release an assign-  
19 ment or restore a pledge to the party entitled to receive the  
20 same, after payment of the debt secured thereby or the  
21 tender of the amount due thereon as aforesaid, shall be liable  
22 in tort to the borrower for all damages thereby sustained by  
23 him.

Section 107 of Chapter 140 deals with the discharge of a mortgage or pledge of personal property or an assignment of wages which is given to secure a small loan. Upon repayment of the loan, the present law provides that the borrower will upon request be discharged of any outstanding assignments, mortgages, pledges, etc., which he may have given.

If the lender refuses to give a discharge when the borrower is entitled to one, he may be liable to the borrower for any damages that result.

There is no essential change in this statute which is for the protection of the borrower.

The amendment adds to the law the concept of the security interest which is traceable to the Uniform Commercial Code now in effect in Massachusetts. In addition, there is a new provision which applies to pledges, mortgages, or security interests, which are given to secure advances of money which may be made in the future. A borrower may be caught up at any given time but it may be reasonable to have a mortgage or pledge or some interest outstanding in favor of a lender who will within a reasonably short time be again advancing money to the particular individual. The amendment would allow such security interests to remain outstanding unless the



borrower requests that they be discharged because no advances are currently being made.

Naturally the lender could again insist upon a security interest if he should make additional loans.

In line 16 we note that the word "or" has been omitted after the words security interest.

We recommend this bill as a clarification of the existing law provided that the word "or" is inserted on line 16 as indicated.

## IV. CRIMINAL LAW AND PROCEDURE

1. Probation should be a *sentence* for the strictly limited purpose of allowing an appeal from an adjudication of guilt
2. The present 60 day rule on revision of certain sentences is reasonable and should not be relaxed. (District Courts)
3. Bail reforms
4. Punishment of corporations by fine
5. Criminal liability of the corporation and its agents

### 1. Appeals from Probation

## SENATE . . . . (1969) . . . . No. 667

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AN ACT PROVIDING THAT AN APPEAL SHALL BE ALLOWED TO THE SUPREME JUDICIAL COURT FROM A DISPOSITION OF PROBATION OR A SUSPENDED SENTENCE WHERE PROBATION HAS BEEN GIVEN.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Section 28 of chapter 278 of the General Laws is hereby
- 2 amended by adding the following paragraph:—
- 3 A disposition of probation or a suspended sentence where
- 4 probation has been given, shall be a judgment within the
- 5 meaning of this section and shall be appealable.

### The Right of Appeal by Persons Who Are Placed on Probation

In *Commonwealth v. Brigham*, XVI Pick (33 Mass.) 10, (1834) Chief Justice Lemuel Shaw commented on a statute which required a bond as a condition precedent to the filing of an appeal. Sufficient sureties were also required and Brigham could not obtain the sureties for his \$2000 appeal bond. Speaking of the statute involved, (St. 1832, c. 130 s. 3) Shaw said:—

“The right of appeal is strictly conditional, and that upon a condition precedent. The condition is, to give such recognizance at such convenient time within the term. *The appeal is from the conviction, not from the sentence.*” (italics added)

Shaw’s decision denied Brigham his right of appeal as he had not given sufficient sureties under the old law. Shaw did seem to suggest the necessity for legislation, although rather indirectly, he said:

"It was competent for the legislature to allow a right of appeal, in such cases and upon such terms as they might prescribe, and, in this respect, it was in their power to take into their view, any consideration of justice and policy.

We think they have put the matter beyond doubt, by giving the right of appeal only on the terms of providing sufficient sureties, and that the courts of justice are bound by the terms of the statute."

What did Shaw mean: "The appeal is from the conviction, not from the sentence"?

The present text of section 28 of Chapter 278 reads as follows:—

§28 Appeal to Supreme Judicial Court.

A defendant aggrieved by a judgment of the superior court founded upon a matter of law apparent upon the record in any criminal proceeding, except a judgment upon a plea in abatement, may appeal therefrom to the supreme judicial court."

This section 28 of Chapter 278 is not the exclusive right of appeal which can be exercised by a convicted person. It is first of all limited to cases where the defendant says that there is a "matter of law apparent on the record" and secondly there must be a "judgment." As Shaw said in 1834, the legislature may "allow a right of appeal, in such cases and on such terms as they might prescribe." This is only one of the "cases" where the right of appeal is given. The error apparent from the *record*<sup>1</sup> necessarily means that there is a bill of exceptions, a report, or a case stated or agreed facts. The evidence in the stenographic transcript is not the "record" under this section. We think that the limited application of Section 28 of Chapter 278 should be noted carefully before we discuss the broader aspects of the suggested legislation. If enacted, it would not apply to appeals in general.

The bill adds to Section 28 the concept that a "*judgment*" shall for the purposes of an appeal under this section, which deals only with errors of law apparent on the record, include (a) probation—which is not any sort of judgment at all, and (b) a suspended sentence followed by probation—which is a final judgment, but one wrapped in confusion and uncertainty. The probation here is possibly a mere condition of the delay in the execution of the sentence which has been suspended.

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<sup>1</sup>For example, the record in *Com. v. Berney* 353 Mass., 571, "shows only the complaints and the facts that the defendant was convicted and fined." In that case the record did not contain the Brookline traffic law which Berney sought to have declared invalid. The record contained no evidence at all. The *judgment* in the *Berney* case *supra* was a \$1.00 fine.

## Can a Person on Probation Appeal the Finding Of Guilt?

It is to be kept in mind that a person is not obliged to accept probation as the disposition of a criminal charge or complaint against him.

If a person is lawfully brought before the Superior Court and is merely *charged* with a crime, he may be placed on probation unless he objects. It is not necessary that such person be convicted of the crime. No finding of guilt need be made.

The district courts and the superior court may, after a person is *convicted* of a crime, place him on probation. There are certain exceptions to this rule the most important of which is that the district courts can not place a person on probation who has previously been convicted of a felony. (G.L. c. 276 sec. 87). The probation must be for a definite time in district court cases, at least.

It seems obvious that if there is no conviction, the court may, after a period of probation, dismiss the case in its discretion. The order of dismissal would be a final judgment. There would be no "record" of any conviction.

Under c. 279 sec. 3 it is provided that "at any time before final disposition of the case of a person placed on probation in the custody of a probation officer, "the officer may arrest him and take him before the court *for sentencing* or for revocation of any suspended sentence." This section definitely implements the suggestion that mere probation is not a final disposition of the case where the sentence has been suspended. It does not settle the finality for a person who has been sentenced, the sentence suspended, and probation given also.

### Probation Is Not a Final Judgment

If a person charged with a crime is placed on probation, and no sentence is imposed, logic dictates a conclusion that there has been no final judgment. It is essential for an appeal that there be a final judgment. It was said in *Commonwealth v. Carver*, 224 Mass. 42, that the court, having imposed no sentence on the defendant (whose guilt in a forgery matter had been established as a fact) had made no final disposition of the case.

The defendant filed exceptions in an effort to appeal his adjudication as a criminal—a forger. The Supreme Judicial Court held that his appeal had no standing; there had been no final disposition of the case, merely a suspension of active proceedings.



## In a Criminal Case, the Sentence Is the Judgment And its Suspension Does Not Effect Finality Of the Judgment

Under Ch. 279 Sec. 1, a court has the authority to suspend the sentence of a fine or imprisonment, and to order the defendant placed on probation. It is said in *Forcier v. Hopkins*, 329 Mass. 668 at 670:—

. . . . “the term ‘conviction’ as used in the statute (c. 233 s. 21) means a judgment that conclusively establishes guilt after a finding, verdict, or plea of guilty. *Commonwealth v. Gorham*, 99 Mass. 420, *Attorney General v. Pelletier*, 240 Mass. 264, 310-311. *Boston v. Santosuosso*, 307 Mass. 302, 330-331. *Commonwealth v. Hersey*, 324 Mass. 196, 205. In a criminal case the sentence is the judgment. *Commonwealth v. Dascalakis*, 246 Mass. 12, 19-20. *Commonwealth v. Millen*, 290 Mass. 406, 411. Suspension of the execution of the sentence by direction of the court under G.L. (Ter. Ed.) c. 279 s. 1, as amended, does not affect the finality of the judgment.”

In this opinion the court further notes that the sentence or final judgment is not vacated by its suspension. The suspension of the judgment or sentence is not a final disposition of the case. The suspension may be revoked by the court and the sentence may be enforced as fully as if no suspension was ever ordered.

In *Mariano v. Judge of the District Court*, 243 Mass. 90, it was said that by suspending the sentence and placing the defendant on probation only the *execution* of the sentence is postponed. It is no less a final judgment because its execution is delayed, even indefinitely.

The discussion in *Forcier v. Hopkins*, *supra* indicates that for the purpose of discrediting a witness with a past criminal record at least (G.L. c. 233 s. 21) “Suspension of the execution of the sentence by direction of the court under G. L. (Ter. Ed.) c. 279, s. 1, as amended, does not affect the finality of the judgment.” In some cases probation is desirable in addition to the suspended sentence.

To get the benefit of probation in this instance, it has been assumed that the defendant can not exercise his right of appeal.

It might be argued that a person who has been sentenced, and has had his sentence suspended, has received a *final judgment* (even though he may also be placed on probation) from which he can appeal. The additional factor of the probation has no real effect on the finality of the previously imposed, and then suspended sentence.

Under G.L. (Ter. Ed.) c. 279 s. 4, the court is required to impose a sentence upon the conviction of a crime “although exceptions have been alleged or an appeal taken.” And this section further pro-

vides that the sentence is not necessarily stayed pending the appeal (except in capital cases where the stay is mandatory).

If c. 279 s. 4 is being interpreted as making it mandatory to sentence a defendant if he wants to take an appeal, rather than imposing a final sentence on him, and then suspending the operation thereof and placing him on probation, the General Court would be obliged to enact some legislation to clarify the terms on which an appeal is permitted. There is an apparent necessity for such legislation at the present time.

## OTHER METHODS OF APPEAL

In addition to c. 278 s. 28, we must note these other methods of appeal.

### 1. On a Transcript

Appeals taken to the Supreme Judicial Court in some of the more notorious criminal cases tried recently in the Superior Court are often governed by G.L. (Ter. Ed.) c. 278 Secs 33A to 33G.

Under this procedure, in capital cases, and otherwise if the court shall order, a transcript of evidence is made, errors are called to the attention of the court, a list of numbered exceptions is prepared, and a copy of the record is transmitted.

Recent cases appealed under this procedure include armed robbery, rape, murder, drug offenses, breaking and entering, and larcenies of various descriptions. The purpose of this procedure is to eliminate delays, and it was suggested by the Judicial Council in its Second Report for 1926, at page 77 et seq.

### 2. By a Report

Another method of appeal is the report of the trial judge under G.L. c 278 secs. 30 and 30A, provided the consent of the defendant is obtained.

### 3. By Exceptions

An appeal on written exceptions is provided under c. 278 s. 31 where no appeal is appropriate under sections 33A to 33G.

### 4. By Writ of Error

There is also the Writ of Error, G.L. (Ter. Ed.) Ch. 250, secs. 1, 2, 9-13, which is used effectively and can even be used where a previous appeal was taken in some other way.

A discussion of the various methods of appeal is found in *Geurin v. Commonwealth* 337 Mass. 264.

## THE FEDERAL APPROACH

The United States Supreme Court has permitted a person to appeal from his conviction:—

- (a) After suspended sentence and probation, and
- (b) Where probation alone was ordered.

In *Korematsu v. U.S.*, 319 U.S. 432 (1943), it was said that when no sentence was imposed and the defendant was merely placed on probation, the judgment is still final and would support an appeal. Previously, in *Berman v. U.S.*, 302 U.S. 211, it had been held that a suspended sentence followed by probation was a final judgment and would support an appeal.

In the *Korematsu* case, *supra* the federal law permitted the judge after conviction, or after a plea of *nolo*, to:—

“ . . . suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms” as seem wise.

Under the Federal law, as under G. L. (Ter. Ed.) Ch. 279 § 4, the Federal probation officer was authorized to arrest the person on probation. (See: 18 U.S. C. s. 725; 18 U.S.C.A. Sec. 725). In both cases the individual is placed under a disciplinary restraint to at least some degree.

If the law is changed, the change should not apply merely to Ch. 278, § 28, but to other appeals as well.

## Recommendations

We are of the opinion that the protection of the individual should include a recognition of his right to appeal from what is loosely called a “conviction” and by which he is diminished and branded as a wrongdoer, a criminal, or a law violator. He should not be made to trade his right of appeal for a chance at probation. If he is entitled to probation, it should not be given as a reward for sacrifice of other legal rights, but because he is a fit person to benefit from supervision and guidance.

The time has come to eliminate the confusion and distress which requires people to beg to be sentenced so they can take an appeal. The legal right to appeal from a suspended sentence followed by probation would seem to exist now, presently, even apart from any legislation, but this right can be clearly declared in a statute.

Mere probation has not been thought to be a final judgment despite the reasoning in the *Korematsu* case which dealt with Japanese Americans during World War II. They were possibly entitled to more “breaks” than some of them received.

Following the reasoning of the United States Supreme Court, with some apologies for its logic in *Korematsu*, we recommend the following in lieu of Senate (1969) 667:—

## 1970 DRAFT ACT

AN ACT RELATIVE TO APPEALS TO THE SUPREME JUDICIAL COURT IN CRIMINAL CASES.

1 Chapter 279 of the General Laws is hereby amended by inserting  
2 after Section 1A the following Section:—

3 A disposition by the court after a finding, verdict, or plea of  
4 guilty in a criminal action of probation only; or a disposition by  
5 the court after such finding, or plea of guilty by the imposi-  
6 tion of a sentence or fine, and the suspension thereof, or of the sen-  
7 tence or the fine, followed by probation shall, for the purpose of an  
8 appeal by the defendant who has been found guilty or who has pleaded  
9 guilty, and for no other purpose, be deemed to be a final judgment re-  
10 gardless of the suspension of any sentence or fine, and regardless of  
11 the lack of any sentence of incarceration or the payment of any fine.  
12 It is the intent of the General Court that the decision of the court  
13 requiring a defendant after a finding, verdict, or plea of guilty, to  
14 submit to the authority of the probation system, and its officers, shall  
15 be deemed to be a final judgment which will support an appeal in the  
16 manner otherwise authorized by law, to the Supreme Judicial Court.

The vote of the Judicial Council was 4 to 3 in favor of this proposal.

## 2. Revision of Certain Sentences

HOUSE . . . . (1969) . . . . No. 4458

AN ACT RELATIVE TO THE REVISION OR REVOCATION OF CERTAIN SENTENCES IM-  
POSED UPON PLEA OF GUILTY OR NOLO CONTENDERE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Chapter 278 of the General Laws is hereby  
2 amended by striking out section 29A, inserted by section 1  
3 of chapter 167 of the acts of 1959, and inserting in place  
4 thereof the following section:—

5 Section 29A. Any district court may, at any time, upon  
6 motion in writing of the defendant, if it appears to the court  
7 that justice may not have been or cannot be done, and upon  
8 such terms and conditions as the court shall order, revise or



9     revoke a sentence or a fine imposed without trial after a plea  
 10    of guilty of nolo contendere, and in the event of revocation,  
 11    permit the withdrawal of the plea upon which the sentence  
 12    or fine was imposed, and grant a trial on the merits.

1     SECTION 2. This act shall take effect upon its passage and  
 2     shall apply to sentences imposed before as well as after said  
 3     date of passage.

Chapter 278 Section 29A of the General Laws now reads:

§ 29A. Sentences imposed upon plea of guilty or nolo contendere; revision or revocation.

“Any district court may within sixty days after a sentence is imposed, if it appears to the court that justice has not been or cannot be done, and upon such terms or conditions as the court shall order, revise or revoke a sentence imposed without trial after a plea of guilty or nolo contendere, and in the event of revocation, permit the withdrawal of the plea upon which the sentence was imposed.

The provision of this section shall not apply to any case which is appealed nor in which, under section twenty-five, an appeal is withdrawn. Added St. 1959, C. 167, §1.”

We do not recommend the suggested change in Section 29A. The present law permits a district court to revise a sentence within sixty days after it is imposed provided that the sentence is imposed without any trial and after a plea of guilty or nolo contendere.

There is a broader provision applicable to the superior court in G.L. (Ter. Ed.) Ch. 278, sec. 29C and the time limit is also sixty days from the date of the sentence. The superior court can revise or revoke “*any sentence imposed*”.

In a serious case we presume that there would be an appeal to the superior court where there would be a trial de novo.

Although the superior court can not revise or revoke a sentence after the expiration of the statutory sixty day period, a new trial may be granted under the provisions of G.L. (Ter. Ed.) Ch. 278 Sec. 29. Formerly a new trial could be granted only if action was taken and perfected before the expiration of one year. When the statute (G.L. Ter. Ed. c. 278 sec. 29) was amended in 1962 the one year limit was removed, and the discretion to revise or revoke the sentence within sixty days was added.

It would be inconsistent to permit the district courts to modify the sentence imposed without trial *at any time* and require the superior court to adhere to a sixty day rule on the same subject, and even on a wider exercise of discretion as provided in the statute.

It is possible that such a statute as the one proposed could operate retroactively, with undesired results.

We have considered the proposal with care and have come to the

conclusion that the power to revise a sentence should be limited. We might point out that even under the proposed statute, the defendant would have to plead guilty or at least *nolo contendere*. It would not apply to one who consistently maintained innocence to the last, and was found guilty. Proposals to detract from the finality of a sentence should be approached with caution.

We do not recommend the bill.

### 3. Bail Reforms

## RESOLVES . . . (1969) . . . Chapter 58

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RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO RELEASE OF CERTAIN DEFENDANTS ON THEIR PERSONAL RECOGNIZANCE INSTEAD OF BAIL IN THE DISTRICT COURTS AND RELATIVE TO PROVIDING FOR STANDARDS FOR THE SETTING OF BAIL AND CERTAIN RELATED MATTERS.

*Resolved*, That the judicial council be requested to investigate the subject matter of current house document numbered 5212, relative to release of certain defendants on their personal recognizance instead of bail in the district courts and relative to providing for standards for the setting of bail and certain related matters, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

## HOUSE . . . . (1969) . . . . No. 5212

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AN ACT RELATIVE TO RELEASE OF CERTAIN DEFENDANTS ON THEIR PERSONAL RECOGNIZANCE INSTEAD OF BAIL IN THE DISTRICT COURTS AND RELATIVE TO PROVIDING FOR STANDARDS FOR THE SETTING OF BAIL AND CERTAIN RELATED MATTERS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 Chapter 276 of the General Laws is hereby amended by
- 2 inserting after section 82A the following section:—
- 3 *Section 82B.* Any person who shall be convicted or accused by
- 4 indictment or information of a crime for which a sentence of
- 5 imprisonment may be imposed, or who shall after examination
- 6 be committed to jail or admitted to bail or released under recog-
- 7 nizance or otherwise released to answer to a charge of any such
- 8 crime, shall be subject to the provisions of this section if the
- 9 crime was committed while he was at large after being admitted
- 10 to bail or released under recognizance or otherwise held to

11 answer pending appeal from conviction of any crime, or for  
12 examination, hearing, trial, disposition or sentence on any  
13 criminal charge.

14 The court shall advance all of the criminal charges pending  
15 against a person subject to the provisions of this section to the  
16 top of the court docket for appeal, examination, hearing, trial,  
17 disposition or sentence. Cases thus advanced on the docket  
18 shall not be subject to any delays or continuances at request  
19 of the person charged, whether on account of other engagements  
20 or non-availability of his counsel or of priority given to other  
21 cases or for any other cause; provided that cases of other  
22 persons subject to this section shall retain priority on the docket,  
23 other persons whose constitutional or statutory rights to a  
24 speedy trial would otherwise be jeopardized shall retain their  
25 priority on the docket, and any person subject to this section  
26 shall be allowed such continuances to obtain counsel, to prepare  
27 his case, and for other purposes as may be required to enforce  
28 his constitutional and statutory rights to a fair trial and to due  
29 process of law.

30 The court shall, after the conviction on a criminal charge of  
31 any person subject to this section by reason of such charge, re-  
32 voke any order for his release, or refuse to order his release, on  
33 bail or under recognizance or otherwise, pending appeal from  
34 such conviction.

35 Any person who shall be convicted of both the original charge  
36 and any subsequent charge which together make him subject to  
37 the provisions of this section shall be sentenced to consecutive  
38 sentences upon the charges.

39 Any person who shall be released on bail or under recogni-  
40 zance to answer to any criminal charge, or pending appeal from  
41 conviction for any criminal charge, shall at the time of his re-  
42 lease be given a copy of the provisions of this section, which  
43 may be embodied in the terms of his bail bond or recognizance.  
44 If it appears that he cannot understand them, he shall have  
45 the right to have them explained to him by the releasing official.  
46 Failure to comply with the provisions of this paragraph shall  
47 not be a bar to the application of this section to any such person.

It was provided by a statute enacted in 1641 "that every person that is to answer for any criminal Cause, whether in Prison or under Bayle; his cause shall be heard and determined at the next Court that hath proper cognizance thereof, if it may be done without prejudice of Justice."

(See: "General Laws of the Massachusetts Colony etc. dated October 1658, revised and reprinted in 1672 under the title "The General Laws and Liberties of the Massachusetts Colony etc. . . p. 38)

Section 18 of the "Body of Liberties" (1641) was mentioned by

Justice Spalding in his interesting review of the history of bail in Massachusetts which is found in *Com. v. Baker*, 343 Mass. 162, at 165-168. (1961).<sup>1</sup>

This statute of 1641 which appears at page 74 of the ancient collection noted above, reads as follows:—

“It is Ordered and by this Court Declared, That No Mans Person shall be Restrained or Imprisoned by any Authority whatsoever before the Law hath Sentenced him thereto, if he can put in sufficient Security, Baile or Mainprize<sup>2</sup>, for his appearance and good Behaviour in the mean time, unless it be in Crimes Capital, and Contempt in open Court, and in Cases where such express Act of Court doth allow it.”<sup>3</sup>

Chapter 276, (sections 21 et seq), of the General Laws, deals with the matter of bail, recognizances, bail bonds, sureties, and the like. The basic statute reads:

## §42 Bail or Commitment

“If it appears that a crime has been committed and that there is probable cause to believe the prisoner guilty, the court or justice shall, if final jurisdiction is not exercised, admit the prisoner to bail, if the crime is bailable and sufficient bail is offered; otherwise he shall be committed to jail for trial.”

Since even first degree murder is bailable, one of the considerations is the sufficiency of the bail offered.

A person whose appearance before the court is by reason of a summons under c. 276 s. 24 (misdemeanor cases) need not furnish bail but may be released on personal recognizance without sureties if the justice believes that such person will appear at the proper time.

If a warrant is issued and a person is arrested, he must be taken before the court having jurisdiction (c. 276 sec. 34). This often means the district court. Upon such appearance, the trial can be

<sup>1</sup>This case held that first degree murder is bailable.

<sup>2</sup>Mainprize could include personal recognizance, or the undertaking of another person such as a bondsman to produce the accused at a certain time.

<sup>3</sup>Bail was not allowed to persons who denied “either by Word or Wrighting, any of the Books of the Old Testament including Genesis, or the New Testament.” Jesuits appear to have been unbailable (by inference) and Quakers were definitely subject to “close prison, there to remain without bail until the next Court of Assistants.”



adjourned from time to time (c. 276 sec. 35) and the court *may*<sup>1</sup> allow the accused to recognize—

... "in a sum and with surety or sureties to the satisfaction of the court or justice, or without surety for his appearance for such further examination and for want of such recognizance he shall be committed."

If the accused fails to give his undertaking to appear at a later time, with or without a deposit of property to insure this appearance, the only alternative is to send him to jail and c. 276 sec. 37 so requires.

In 1963 the move for certain reforms in bail procedures resulted in an awareness that misdemeanor suspects, and others were denied admission to bail in a large percentage of cases because they had no property to use as surety and could not even afford the fees of the bail bondsmen.

It was the opinion of many authorities that this distinction was grossly unfair. Many persons were held in jail awaiting trial and were found innocent. Others spent lengthy periods in jail before trial for offenses which were not of such a serious nature that the procedure was relevant.

## **Temporary Bail Reform in the District Courts Expires July 1, 1970**

In 1968 by Chapter 127 of the Acts of 1968 the temporary statute which allowed release on personal recognizance of persons charged with offenses under the jurisdiction of the District courts ceases to be operative. It is under this statute that a person may be released on his own promises to appear at the specified time for trial or hearing. The justice, clerk, or bail commissioner may consider the background of such person in permitting such release on personal recognizance. Failure to permit such release is appealable to a justice of the superior court.

To continue this practice of allowing release of persons on their personal recognizance and *without sureties* such as bankbooks, cash, bail bonds or other property, the special provisions of Acts, 1968, c. 127 can be extended by the General Court to a future time, or the provisions of that law can be now enacted as a general law with no limitation as to its application.

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<sup>1</sup> The use of the word "may" results from the mention in the statute that the defendant shall be committed if he is "charged with a crime not bailable". Amendment No. 8 in the Bill of Rights of the U.S. Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

## **Bail Jumping Is a Crime under c. 276 sec. 82A**

G.L. (ter. ed.) c. 276 sec. 82 A now provides that if a person is released on bail or personal recognizance and without sufficient excuse subsequently fails to appear before the district court at the specified time and place, such person has committed a substantive offense which is known by the term of "bail jumping". The punishment for "bail jumping" is one year in jail or a one thousand dollar fine or both.

The Judicial Council recommended this statute in its 40th Report for 1964 at page 33. In *Sclamo v. Commonwealth*, 352 Mass. 576 (1967) a defendant, Sclamo, filed a petition in the Supreme Judicial Court for a Writ of Error alleging deprivation of his constitutional rights when he was sentenced under c. 276 sec. 82A for "bail jumping". Sclamo was released on bail after his arraignment and failed to appear for trial when the case was called. Sclamo's idea of a sufficient excuse was "I just kind of took off". We do not see that Sclamo's excuse was the sufficient excuse called for by the statute, but he was entitled to a new trial on the matter.

The Judicial Council intended that the enactment of Sec. 82 A would create a new crime. A violation of the recommended statute was to be treated as a new criminal offense and not as contempt of court. It was our opinion that while it would be just and proper to allow a large number of accused persons to give personal recognizance (or bail without sureties) for their appearance for trial at a future date, it was necessary to compel such later appearance in court by criminal sanction. We desired to reduce any chance for injustice in the bail system, but we felt that this would best be accomplished by Sec. 82A. We also said that "some defendants cannot safely be released under any conditions".

## **The Present Concept of Bail**

Under the existing statutes, including the temporary reform measure applicable to the district courts which expires on July 1, 1970, the policy of the commonwealth is or seems to be directed to the release of as many persons awaiting trial as is consistent with safety and the protection of the public from actual harmful acts.

The enactment of the statute making "bail jumping" a new crime is part of an over-all plan to keep as few people in jail awaiting trial as possible. We also might take note of the new situation where a defendant accused of theft jumps bail before trial and thus opens himself not only to the penalty for theft but also the penalty for bail jumping. We can also note the desirability of disposing of both criminal charges at one session of the court, if this is possible. As bail jumping is a crime, the accused has all of the constitutional

and other rights he would have if accused of any other offense against the criminal law.

### **The New Legislative Proposals**

With the foregoing background, we approach the actual bill which was referred to us by Resolves, 1969 Ch. 68. This bill (House 5212 of 1969) was reported out by the committee on the Judiciary on May 21, 1969 after that committee had considered several legislative proposals on bail including House Bills 3253, 3485, 3486, and 3689 of 1969.

These bills dealt with the release of accused persons under conditions where it was not required of them that they furnish cash, property, bankbooks, or bail bond expense. Other proposals dealt with persons charged with more serious offenses, and one proposal would have denied bail to persons who had already committed an alleged prior felony.

### **House (1969) No. 5212**

The title of this bill is very misleading. We are under the impression that the purpose of the bill is to deal with persons who commit crimes *after* they have been brought before the court on a previous criminal charge but have not yet been finally convicted of such charge in the Superior Court, or secured a review by the Supreme Judicial Court. In this light, the bill has relevance to existing statutes, otherwise it does not.

The following table sets forth the most common situations to which this bill might be said to apply:—

Status of Accused	Action of Court	Action Pending
1. Indicted, and arraigned, allowed to be free on bail, or on personal recognizance. (Also on "informations")	Accepted bail or recognizance for trial at later date.	Awaiting Trial in Superior Court.
2. Arrested or summoned into District Court, case continued for further hearing.	District Court allows bail or personal recognizance.	Awaiting Trial in District Court.
3. Convicted in District Court but appealed and awaiting the appeal.	District Court allows recognizance for prosecution of appeal.	Awaiting Trial in Superior Court on Appeal.
4. Awaiting trial in Superior Court on appeal; case continued from time to time.	Allowed free on recognizance.	Pending trial in Superior Court.
5. Convicted in Superior Court but not sentenced.	Freed on bail or recognizance.	Sentence and investigation pending.
6. Convicted and sentenced in Superior Court but appeals to Supreme Judicial Court; or where a ruling is appealed before trial, or some other procedure applies of a like nature.	Free pending decision on appeal.	Issue of law to be decided by Supreme Judicial Court.
7. Incarcerated in Jail or prison.	Remanded to Jail, and denied freedom.	Trial pending.

If the individual in any of the situations shown in the table, or in a like situation, should commit another crime "while he was at large" pending the action indicated in the table, such individual would be dealt with under the special provisions of this proposed statute, House 5212, as follows:—

- a. All proceedings against him would be expedited; no delays or continuances allowed and the charges against him would be heard and disposed of by trial and/or appeal on a priority basis. His constitutional rights would be preserved however.
- b. If convicted of a crime committed while in the status indicated in the table above, such person would be denied his freedom pending his appeal, if any.
- c. If convicted of a crime committed while in the status indicated above, *and* also convicted of an offense as a result of which offense such person was in the status above indicated when he committed the second crime, the sentences given to him are to be consecutive—one to be served at the end of the first sentence and not to be served together.

The bill is a complex one and indicates a desire to deal with a host of difficult problems under one umbrella.

The last section of the bill requires a copy of the suggested pro-



vision be given to the affected individual, or that it be explained to him.

Perhaps this bill is overly complicated and can be made more plain. We recommend the following:—

## 1970 DRAFT ACT

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Chapter 276 of the General Laws is hereby amended by inserting after section 82A the following section:—

*Section 82B.* Any person who shall be convicted or accused by indictment or information of a crime for which a sentence of imprisonment may be imposed, or who shall after examination be committed to jail or admitted to bail or released under recognizance or otherwise released to answer to a charge of any such crime, shall be subject to the provisions of this section if the crime was committed while he was at large after being admitted to bail or released under recognizance or otherwise held to answer pending appeal from conviction of any crime, or for examination, hearing, trial, disposition or sentence on any criminal charge.

The court shall advance all of the criminal charges pending against a person subject to the provisions of this section to the top of the court docket for appeal, examination, hearing, trial, disposition or sentence. Cases thus advanced on the docket shall not be subject to any delays or continuances at request of the person charged, whether on account of other engagements or non-availability of his counsel or of priority given to other cases or for any other cause; provided that cases of other persons subject to this section shall retain priority on the docket, other persons whose constitutional or statutory rights to a speedy trial would otherwise be jeopardized shall retain their priority on the docket, and any person subject to this section shall be allowed such continuances to obtain counsel, to prepare his case, and for other purposes, as may be required to enforce his constitutional and statutory rights to a fair trial and to due process of law.

The court shall, after the conviction on a criminal charge of any person subject to this section by reason of such charge, revoke any order for his release, or refuse to order his release, on bail or under recognizance or otherwise, pending appeal from such conviction.

Any person who shall be convicted of both the original charge and any subsequent charge which together make him subject to the provisions of this section shall be sentenced to consecutive sentences upon the charges.

#### 4. Corporate Liability for Crime

### HOUSE . . . . (1969) . . . . No. 2241

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AN ACT DEFINING THE CRIMINAL LIABILITY OF CORPORATIONS AND ESTABLISHING  
CRIMINAL LIABILITY OF INDIVIDUALS FOR CORPORATE CONDUCT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Chapter 274 of the General Laws is hereby amended by  
2 adding after section 7 the following new section:—

3 Section 8. As used in this section, the following words shall  
4 have the following meanings:—

5 “Agent” means any director, officer or employee of a  
6 corporation, or any other person who is authorized to act in  
7 behalf of the corporation.

8 “High managerial agent” means an officer of a corporation  
9 or any other agent in a position of comparable authority with  
10 respect to the formulation of corporate policy or the supervi-  
11 sion in a managerial capacity of subordinate employees. A  
12 corporation is guilty of an offense if:

13 (a) The conduct constituting the offense is engaged in by  
14 an agent of the corporation while acting within the scope of  
15 his employment and in behalf of the corporation, and the  
16 offense is a misdemeanor, or the offense is one defined by a  
17 statute that clearly indicates a legislative intent to impose  
18 such criminal liability on a corporation;

19 (b) The conduct constituting the offense consists of an  
20 omission to discharge a specific duty of affirmative perfor-  
21 mance imposed on corporations by law; or

22 (c) The conduct constituting the offense is engaged in,  
23 authorized, solicited, requested, commanded or knowingly  
24 tolerated by the board of directors or by a high managerial  
25 agent acting within the scope of his employment and in  
26 behalf of the corporation.

27 A person is criminally liable for conduct constituting an  
28 offense which he performs or causes to be performed in the  
29 name of or in behalf of a corporation to the same extent as if  
30 such conduct were performed in his own name or behalf.

A corporation is a legal person, existing under the authority of the law, independent of its shareholders acting only by agents, and directed by a board of directors.

The directors are ultimately responsible to the owner stockhold-

ers, (or members) for whose ends the legal corporate person was created and exists.

In some of the penal codes, and in the Model Penal Code of the American Law Institute, the term "person" includes any natural person and, where relevant, a *corporation* or an unincorporated association.

## CORPORATE LIABILITY FOR CRIME

Under the re-draft of House (1969) 2241, a corporation would be criminally liable (if not already so liable) for conduct constituting a criminal offense if this conduct consists of:

CLASS I	CLASS II	CLASS III
<p>a. ACTS OF CORPORATE AGENT, OFFICER, DIRECTOR, EMPLOYEE, ETC. MISDEMEANOR ONLY.</p>	<p>b. FAILURE TO ACT: OMISSION TO PERFORM DUTY IMPOSED BY LAW ON THE CORPORATION. COMMON LAW OR STATUTORY OFFENSE.</p>	<p>c. ACTS OF BOARDS OF DIRECTORS OR "HIGH MANAGERIAL AGENT" OR RECKLESS TOLERATION OF WRONGDOING. MISDEMEANOR OR FELONY.</p>
<p>Act must be:—</p> <ol style="list-style-type: none"> <li>1) within scope of employment</li> <li>2) in behalf of corporation</li> <li>3) Misdemeanor, not felony or</li> <li>4) The statute shows clear legislative intent to impose criminal liability on corporation.</li> </ol>	<ol style="list-style-type: none"> <li>1) A specific affirmative duty is imposed by law directly on the corporation itself.</li> <li>2) Participation by agents, officers, etc., is not required as in I and III. Intent to commit a crime is not strictly essential.</li> <li>3) There is a strict liability imposed on the corporation</li> </ol>	<p>Acts must be:—</p> <ol style="list-style-type: none"> <li>1) authorized, or</li> <li>2) solicited, or</li> <li>3) requested, or</li> <li>4) commanded, or</li> <li>5) recklessly tolerated by:               <ol style="list-style-type: none"> <li>a. The Board of Directors or</li> <li>b. A "High Managerial Agent" acting within the scope of his employment and in behalf of the corporation.</li> </ol> </li> </ol>



## Some Past Decisions Newly Classified

## CLASS I

- I a. *Com. v. Hamilton Mfg. Co.*, 120 Mass. 383 (1876). Hours of work for women and children in a mill were not to exceed 64 per week. The mill superintendent worked persons more.
- I b. *Com. v. Bost. & Worc. R.R. Co.*, XI Cushing (65 Mass.) 512. Wrongful death.
- I c. *Com. v. Beneficial Finance Co.*, 1969 A.S. 299. Agents conspired (a misdemeanor) to give gifts etc. to obtain favorable treatment.
- I d. *Com. v. American News Co., Inc.*, 333 Mass. 74. Obscene literature.

## CLASS II

- I a. *Com. v. Minicost Car* 1968, A.S. 1267. Duty imposed on corporation. Article IV, §1, of the City of Boston Traffic Rules and Regulations provides in material part: "No person shall allow, permit or suffer any vehicle registered in his name to stop, stand or park in any street, way, highway, road, or parkway under the control of the city in violation of any of the rules and regulations of the Traffic and Parking Commission. . . ." The authorization for the foregoing is St. 1929, c. 263, as amended.
- II b. *Com. v. N. Y. Central Railroad*, 350 Mass. 724. Duty imposed on corporation operating a railroad. G. L. (ter. ed.) c. 160 §151. Not to obstruct public way for more than five minutes at a time wilfully or recklessly with railroad cars or engines.
- III c. *Com. v. Ober*, 286 Mass. 25. *Common Law. Com. v. Central Bridge Corp.*, XII Cush. (66 Mass.) 242; *Com. v. Props. of New Bedford Bridge*, II Gray (68 Mass.) 339.

## CLASS III

- III a. *Com. v. Abbott Engineering, Inc.*, 351 Mass. 568. Acts engaged in by Mogavero, Chairman of Board of Directors wife owned all the stock; president was merely carrying out the design of Mogavero to commit larceny by commanding the corporation to do it by raising M.D.C. in voices.
- III b. *Com. v. Marinucci Bros. & Co., Inc.*, 1968 A.S. Corporation pleaded guilty to larceny from Dept. of Public Works in sum of \$192,298.30. Fines imposed. Acts of larceny were done by an agent who filed payment claims for corporation which received the \$192,298.30 wrongfully.
- III c. See: *Com. v. Louis Const. Co.*, 343 Mass. 600 where corporation defendant's conviction was reversed on appeal.
- III d. Price fixing, anti-trust; violation of economic laws; violation of statutes regulating business activities. *U.S. v. H.P. Hood & Sons*, 1962; *U.S. v. General Electric*, 1961; *Com. v. Dyer*.

## CLASS I

### CORPORATE CRIMINALS

The conviction of a corporation as a legal person for violation of a specific statute is well established in the law. In *Commonwealth v. Boston and Worcester Railroad Corp.* XI Cushing (65 Mass.) 512 the railroad was indicted by the grand jury of Norfolk County under the provisions of an 1840 statute which penalized railroads for grossly negligent conduct resulting in death. Without such a law, the right to recover damages for wrongful death did not exist. Here we have positive wrongdoing by an agent.

The penalty provided in such cases was a fine of not less than \$500 nor more than \$5000 "to be recovered by indictment to the use of the executor or administrator" of the deceased person. Legislation of this kind is the forerunner of our present wrongful death act (Chapter 229 of the General Laws).

In this 1853 case, the railroad contended that as a corporation, it was not liable to the penalty set forth in the statute because corporations were not designated under the law. In holding that the word "proprietors" included corporations, the court said:

. . . "we can have no doubt as to the intended meaning, and the effect that ought to be given to it, and that it applies to all common carriers, whether corporate or joint stock companies, the terms used being general, and embracing common carriers incorporated or not."

The court upheld the fine and it was paid to the legal representatives of the person killed in the train wreck.

The court also made the interesting comment that the names of the agents and servants of the railroad were unimportant as far as the indictment was concerned. The railroad could be presumed to know its agents and servants. The only thing that was of legal significance was "the manner in which the negligence was manifested, or the precise acts of carelessness to which the injury was attributable and this is set forth with all necessary particularity."

Very recently in *Commonwealth v. Beneficial Finance Company*, 1969 A.S. 299 the Beneficial Finance Company, the Household Finance Corporation, and the Local Finance Corporation, together with individuals, were indicted on charges of conspiracy, a misdemeanor, to give gifts and gratuities to an official of the banking division in order to obtain favorable consideration in the loan business. Verdicts of Guilty were returned against the corporations and the court imposed fines on these corporations.

In *Com. v. Louis Construction Co., Inc.* 343 Mass. 600 the corporate defendant was found guilty on four indictments charging it

with larceny from the Commonwealth. The president and treasurer of the corporation was likewise indicted and convicted of the same larceny by false pretenses (See G.L. c. 266 s. 30).

The convictions were reversed but in so far as the corporation was charged with having made a false statement intending that it be relied upon by another, and that it was relied on, and that money was paid to the corporation by reason thereof, it becomes apparent that the president and treasurer or some other officer of the corporate defendant must have acted as its agent.

One looks in vain for some indication of criminal intent on the part of the corporation in the report of this case.

On the other hand, in *Com. v. Abbott Engineering, Inc.*, 351 Mass. 568 at 574 the court noted that it did not appear that the defendants (including, of course, the corporate defendant) "had contended at the trial that the raising of the M.D.C. invoices was not criminal". Criminal intent must normally be proved in an indictment for obtaining money under false pretenses (G.L. c. 266 s. 30). and in the *Abbott Engineering Inc.* case, *supra* it appears that a "general intent" was proven. Here, of course is a felony case properly assigned to Class III.

*Commonwealth v. American News Co. Inc.* 333 Mass. 74 (1955) was an indictment of a corporation under the provisions of G.L. (Ter. Ed.) c. 272 Sec. 28. The corporation was charged with having in its possession for the purpose of sale a certain allegedly obscene book which tended to corrupt the morals of youth. It was further proved that the book was sold to a person under eighteen years of age. The conviction was reversed on technical grounds after a fine had been imposed.

## CLASS II

### FAILURE TO PERFORM AFFIRMATIVE DUTY, AND STRICT CRIMINAL LIABILITY

In *Commonwealth v. Ober*, 286 Mass. 25, (1934) the defendant was the owner of a car which had been parked on the street in violation of the city ordinances controlling parking and traffic. There was no evidence as to the identity of the person who parked the vehicle; there was no proof that Augusta Ober, the defendant owner of the car, did the parking. She defended on the ground that:

"It is well settled in this Commonwealth that in order to find the defendant guilty of a crime committed by another there must be facts and circumstances from which the court can reasonably infer that the defendant had knowledge."

The Supreme Judicial Court said that this general principle was correct to the extent that the criminal law requires that an essential ingredient of a criminal offense is that there should be:—

“ . . . some blameworthy condition of the mind, sometimes it is negligence, sometimes malice, sometimes guilty knowledge.”

Indicating that the General Court may enact legislation which makes an act a crime, *even when there is no intent or criminal knowledge by the offender*, and thus create a class of offenses *mala prohibita* rather than evil in themselves, the decision in *Com. v. Ober*, *supra* states this:—

“When a criminal offense is charged there must be a *mens rea*, but it is manifest that there is a large class of cases in which it is unnecessary to prove a criminal intention, for instance in an indictment for obstructing a highway. . . .”

Statutes were cited where criminal liability was imposed without proof of a guilty knowledge in the area of intoxicating liquor sales, sales to minors, adulterated food and impure milk, and violations of motor vehicle laws. The city ordinance imposing a fine on the owner of the illegally parked car was said to belong to the class of statutes where the General Court, legislating for the common welfare has put the burden upon the individual of ascertaining at his peril whether his conduct is within the scope of the criminal prohibition. In this “class of statutes” the court said that:—

“The moral turpitude, the motive which prompts the illegal act, and the knowledge or ignorance of its criminal character are immaterial on the question of guilt.”

## **Respondeat Superior — Imputed Guilt to the “Master”**

In *Com. v. Ober*, *supra* at page 31, the court said that, in addition to that class of cases where certain acts were *mala prohibita* and an offense was provable without showing any intent, “*Some legislative acts go further and make a master liable criminally for offenses committed by his servant.*”

The commentary is of interest here:—

“Undoubtedly the general rule is, as the defendant contends, that the master is not criminally liable for the acts of his servant done contrary to his orders and without his authority, express or implied, merely because the act done is within the course of his business and within the scope of his employment. The rule is different if the act is that of the master because done by the servant within his authority, especially if it is an act which is made punishable even when done in ignorance of its punishable quality. In such cases the statute applies to the master as well as the servant.”



In applying *Com. v. Ober, supra* to the problems of over-time parking, which the court called "public mischief", there is little difficulty.

What of the "rule" that makes the master criminally liable "if the act is that of the master because done by the servant within his authority" in a situation which is evil in itself such as bribery, larceny, or price-fixing?

## Corporate Criminals at Common Law — Intent Immaterial

The conviction of a corporation under the common law of an offense which was non-statutory and which was a neglect of a public duty was clearly recognized by Chief Justice Shaw in 1853.

In *Commonwealth v. Central Bridge Corporation*, XII Cushing (66 Mass.) 242, the bridge corporation at Lowell was indicted by the grand jury on two counts of maintaining a nuisance (an unlighted bridge) and was found guilty. Chief Justice Shaw said:—

"They were indicted for a neglect of public duty, in not keeping the bridge in a safe and convenient condition for travellers by night as well as by day, whereby it became a public nuisance."

Shaw explored the origins of the responsibility to light the bridge and found none in the actual statute incorporating the bridge but he concluded:

". . . . "the court is of the opinion, that taking the entire act (i.e. of incorporation) the defendants were bound to build, maintain, and keep a bridge, being a section of highway, and it was their duty to keep it in a safe and convenient state and condition to accomplish the purpose for which it was designed."

Whether it should have thus been lighted at night was a question for the jury.

Shaw stated further that the bridge corporation contended by way of defense that the indictment did not charge them with any indictable offense; the Chief Justice disposed of this:—

"We suppose it a perfectly well-settled principle, that neglect of a public duty, by an individual or a corporation, may be prosecuted and punished by indictment, and that this is the proper mode by which the law is to be enforced."

The conviction of this corporation was upheld and as the jury found it was negligent in the performance of its public duty, it was penalized by fines.

**“Corporations cannot be indicted for offenses which derive their criminality from evil intention. . . .”**

### **An 1854 View of It!**

In *Commonwealth v. Proprietors of New Bedford Bridge*, II Gray (68 Mass.) 339, the corporation which operated a bridge across the Acushnet River between Fairhaven and New Bedford was indicted for nuisance by reason of obstructing navigation. In this 1854 case, the Supreme Judicial Court dealt with the criminal responsibility of corporations, saying:—

“The indictment in the present case is for a nuisance. The defendants contend that it cannot be maintained against them, on the ground, that a corporation, although liable to indictment for non-feasance, or an omission to perform a legal duty or obligation, are not amenable in this form of prosecution for a misfeasance, or the doing of any act unlawful in itself and injurious to the rights of others. There are *dicta* in some of the early cases which sanction this broad doctrine, and it has been thence copied into text writers, and adopted to its full extent in a few modern decisions. But if it ever had any foundation, it had its origin at a time when corporations were few in number, and limited in their powers, and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it; and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals. To a certain extent, the rule contended for is founded in good sense and sound principle. Corporations cannot be indicted for offences which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offenses against the person. But beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses.”

## CLASS III

## ACTS OF CORPORATE MANIPULATORS

The criminal activities of corporations are not confined to business crimes such as price fixing or market rigging. Corporations have been indicted for such mundane crimes as larceny and related activities. The philosophy on executive involvement seems to remain the same.

On February 12, 1965 the Abbott Engineering, Incorporated, a business corporation, was indicted, along with one Mogavero, chairman of its directors, on eleven counts of larceny involving about ninety thousand dollars. From the point of view of the criminal law, the corporation was a legal person existing apart from its stockholders, but the court found that Mogavero managed all of the corporation's affairs, and that Mogavero's wife held all the stock. In affirming the conviction of both Mogavero and his corporation, the court says in *Com. v. Abbott Engineering, Inc.*, 351 Mass. 568, at 580:—

"Mogavero also contends that the court should have directed a verdict of not guilty for him because the evidence showed him to be, at worst, an accessory before the fact. This disregards the evidence. The jury could find that Mogavero's relation to the crime was not limited to advising, aiding, and abetting. See *Commonwealth v. Mannos*, 311 Mass. 94, 109.

The evidence lent support to the conclusion that actual control of the corporation and its transaction was vested in Mogavero by virtue of his position as chairman of the board of directors and by reason of his wife's ownership of all Abbott stock, and that Carr, as nominal president of Abbott, was merely carrying out the design of Mogavero. The jury on the evidence could find that Mogavero had named Carr president because of a belief that a statute made it necessary or advisable that the president be a registered professional engineer, and that Carr's concern was with engineering or technical matters only and not with the financial management of Abbott's affairs. Where a principal is in full control and participates in an agent's act by close direction and assent, principal criminal responsibility attaches to him. *Commonwealth v. Welansky*, 316 Mass. 383, 402, see *Commonwealth v. Nichols*, 10 Metc. 259; *Commonwealth v. Riley*, 210 Mass. 387, 395-396.

Mogavero was more than a co-conspirator not participating in the substantive offense. See *Commonwealth v. Kiernan*, 348 Mass. 29, 49. Compare *Commonwealth v. Stasiun*, 349 Mass. 38, 49.

For the reasons just stated the court did not err in instructing the jurors that they could find Mogavero guilty even if they found that he did not participate directly in the larceny, so long as they found he directed, authorized, and consented to it."

## RECKLESS TOLERATION BY THE MANAGEMENT

Under "Directive 20.5" issued and purportedly circulated and re-circulated among the management men of the General Electric Company prior to 1960, all anti-trust activity such as rigging bids, dividing the market with competitors etc. was prohibited as a matter of official G.E. policy. It had been re-issued in January 1957 by one of the defendants in the 1961 TVA price fixing case. There was even an indication that the president of G.E. was in the habit of issuing warnings in person to various executives not to violate laws which were supposed to encourage competition in industry.

In the 1960 annual report to stockholders distributed by G.E., dated February 17, 1961, the company said:—

"General Electric believes that the anti-trust laws should be aggressively enforced. It has been and will continue to be, the policy of the company to comply strictly with these laws, with no exception, compromise or qualification. As the record well establishes, the actions of these few individuals were not in conformance with Company policy, but were a deliberate violation of General Electric Directive Policy."

The stockholders were told that the government had not charged that the Board of Directors and president Cordiner had knowledge of the conspiracies:—

"nor does the Government claim that any of these men personally authorized or ordered commission of any of the acts charged in any of the indictments."

It is somewhat incredible to find that the stockholders were told in this same 1960 report, just ten days after G.E. was fined \$437,500:—

"The individuals involved went to great lengths to keep their activities hidden from those in the Company charged with assuring compliance with the Company's policy."

and:—

"The Company's management strongly believes it was diligent and under the circumstances could not reasonably have discovered sooner than it did the deliberately secretive activities in question. The management is determined however, to take every feasible measure to prevent any recurrence of violation of either the Company's Directive Policy or the law."

In commenting on the General Electric-Westinghouse "price-fixing" cases in 1961, the knowledgeable editors of the *Wall Street Journal* asked: "How could this happen unknown to those responsible for knowing what their companies are doing? The *New York*



*Herald Tribune* noted the fact that the individuals were upstanding citizens, Little League organizers, church deacons etc. and after pondering their ethics said that the government had secured a statement which "in effect absolved its chairman, (General Electric) president, and board of directors of knowledge and involvement. The question remains: If they didn't know what was going on why didn't they?"

Other reporters talked about hypocrisy and noted that the top executives had thrown the lower echelon men to the wolves. One writer in the *Berkshire Eagle* said:—

"There is just one thing a corporation is loyal to, and that is profit. If its employees and even its officers become less useful to it, out they go. If in serving its aims certain men engage in illegal practices, and get caught at it, they are doubly chastised. They are disowned by the corporation that taught them the trick, and they are fined or jailed by the government that caught them at it."

When corporate officers and agents are convicted (or even indicted) for criminal activities which violate the anti-trust laws or other rules of conduct established for the executive "corporation man", it is inevitable for arguments to be made that there should be no individual punishment. In this renowned General Electric case in Philadelphia in 1961, defense counsel for one executive said that it would be a "great personal tragedy, for this fine man who stands before Your Honor today to have any kind of jail sentence imposed." Judge Ganey remarked that the individual was a vice president of the corporate defendant and "was the most aggressive conspirator" in the situation which involved some \$63,000,000. The judge also stated that he had "directed his subordinates very aggressively" and was involved in another escapade of violations which involved four hundred million dollars a year. The punishment was a fine of \$5000.00 and a thirty day jail sentence.

. . . . "those who guide and direct their policy."

At the time of sentencing in the G.E. case, Judge Ganey said:—

"This Court has spent long hours in what it hopes is a fair appraisal of a most difficult task. In reaching that judgment it is not at all unmindful that the real blame is to be laid at the doorstep of the corporate defendants and *those who guide and direct their policy.*"

"While the Department of Justice has acknowledged that they were unable to uncover probate evidence which would secure a conviction beyond a reasonable doubt of those in the highest echelons of the corporations here involved, in a broader sense, they bear a grave responsibility; for one would be most naive indeed to believe that these violations of

the law, so long persisted in, affecting so large a segment of the industry, and finally, involving so many millions upon millions of dollars, were facts unknown to those responsible for the corporation and its conduct; and accordingly, under their various pleas of guilty fines will be imposed."

"... I am convinced that in the great number of these defendants' cases they were torn between conscience and an *approved corporate policy*, with the rewarding objectives of promotion, comfortable security, and large salaries — in short, the organization or company man, the conformist, who goes along with his superiors and finds balm for his conscience in additional comforts and the security of his place in the corporate set up. That this cannot in any way be a defense to their misconduct is conceded, but long probationary periods, where a watchful eye can be kept on their activities, and fines, will suffice for these first offenses."

There are few who really believe that price fixing and other business crimes are uncommon or that after a reasonable time we will not have another great expose of the unlawful profit making activities of large corporations. In all of these past, present, and future stories of white collar business sin, it is almost routine to discover that the written mandate of the president and board of directors is to do good and avoid evil. Officially then, the scope of the authority of the corporate officer or agent is limited to lawful activities; any deviation will be retrospectively regarded as "shocking" by top management who once again will express "deep grief" and piously refer to the matter as a "humbling experience".

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NOTE: Although often called the "G.E." case, the defendants included Westinghouse, Allis Chalmers, Federal Pacific Electric, I-T-E Circuit Breaker Co. and General Electric, as well as a number of individuals.

## **The Chief Executive's "Moral Responsibility"**

The Hood company was fined \$40,000 for conspiracy in June 1964 after having been indicted in Boston on April 24, 1962, at which time a Hood spokesman said:—

"An indictment is merely the bringing of charges. It is not a conviction. We are confident that future events will show that we are not guilty of these charges, nor have we condoned any activities which are contrary to the law or to the best interests of our customers or the consuming public."

On June 9, 1964, the Hood company made another statement:—

The Hood Company changed its plea in court on the advice of its lawyers. Because the matter is still pending before the court, it would be inappropriate for us to comment further on the case at this time."

On June 16, 1964, after paying a \$5000.00 fine on a plea of nolo contendere to charges of conspiring to fix prices for daily products, the chairman of the board of this milk company said:

"Compliance with all laws and regulations has always been the intention and the policy of the Hood Company. In addition I personally have never intentionally or knowingly violated the law. In order to reinforce our company's anti-trust policies, I took positive steps more than two years ago to make sure that new procedures were adopted to prevent any possible recurrence of charges of this kind. I did that because I believe that the chief executive of any company has the moral responsibility to the government and the public to make every effort to insure that the company does not violate the law."

### **Is there executive "Insulation from Moral Responsibility"?**

In its "Fifth Report" entitled "Comprehensive Report and Appendices", dated May 17, 1965, pps 64-65 the Massachusetts Crime Commission said:

"The Commission has received evidence that some corporations have engaged in corrupt transactions to obtain favors or to overcome obstacles.

The heads of such corporations who know about the corrupt methods used are as corrupt as those who obtain results for them by such methods. Lawyers, lobbyists, public relations men or other representatives are provided with funds for which they are not expected to give true accounts. They know that they are expected to conceal the means by which they obtain the required ends. This attempted insulation from moral responsibility is cloaked in such cliches as "being realistic" and "meeting competition". It constitutes a specious excuse for failure to oppose corruption."

### **Constitutional Issues**

There is a doctrine which distinguishes between more serious offenses and petty offenses (over-time parking) which carry small fines as penalties and the conviction of which does no grave damage to the offender's reputation. (See: *Commonwealth v. Buckley*, 1968 A.S. 981 for a full discussion by Justice Cutter).

By-passing the less serious matters, and even conceding that the legislature may make some action criminal even without proof of intent, there is the larger question of constitutional law.

It can reasonably be assumed that corporations which are indicted for violations of the criminal law will plead the constitutional defense that any fine would be a taking of property without Due Process, as the corporation had no knowledge of the wrong doing.

The authority of the corporate agent would be denied, and the illegal act of the agent would be labeled by the corporation as unauthorized and action of the agent alone.

The proposed legislation is not directed at an isolated unauthorized act of a venal employee who commits some offense without the knowledge of his manager and officers. The management can not, however, contend that it saw no evil and heard no evil when the evidence is quite to the contrary.

In *Commonwealth v. Buckley, supra*, the defendant contended that he could not be convicted of a violation of G.L. c. 94 § 213 A without proof that he had knowledge that some narcotic drug was *illegally kept or deposited* where he was present.

Sec. 213A, this statute, if interpreted as imposing strict criminal liability without knowledge, does not require that any mens rea or criminal intent be proved. The penalty could be as much as five years in prison and a five thousand dollar fine, and this can not be called "relatively small". Buckley's argument, so far as it applied to him, was rather demolished by the evidence that he was sitting at a table on which was found "plainly visible marijuana and a half smoked marijuana cigarette."

Buckley's argument was sufficient to lead the court to read the word "knows" into Section 213 A so that a person could not be convicted under it unless he knew of the presence of the narcotic drug.

The Supreme Judicial Court was careful to avoid the serious constitutional issues which would have been raised if Buckley had been strictly liable to the five years in prison merely for being present where unknown to him a narcotic drug was illegally kept or deposited. The court construed the statute to avoid the constitutional dilemma.

It is reasonably and soberly argued that Due Process of Law requires that the accused have knowledge of the facts and circumstances which are proscribed. Strict criminal liability, in a matter of substantial concern, such as grand larceny or bribery, to give examples, is to be approached with a measure of caution. (See *Am. Law Inst. Model Penal Code — Proposed Official Draft — May 4, 1962, Sec. 2.05; and Article 2 "General Principles of Liability"*.)

### Impairment of Contract?

It was suggested in 1876 that the enactment of a statute which provided criminal sanctions against a corporation was unconstitutional as it was an impairment of the contract between the corporation and the commonwealth which arose when the charter was issued to the corporation. The court disposed of this suggestion handily:—



The learned counsel for the defendant in his argument did not refer to any particular clause of the Constitution to which this provision is repugnant. His general proposition was, that the defendant's act of incorporation, St. 1824, c. 44, is a contract with the Commonwealth, and that this act impairs that contract. The contract, it is claimed, is an implied one; that is, an act of incorporation to manufacture cotton and woollen goods by necessary implication confers upon the corporation the legal capacity to contract for all the labor needful for this work. If this is conceded to the fullest extent, it is only a contract with the corporation that it may contract for all lawful labor. There is no contract implied that such labor as was then forbidden by law might be employed by the defendant; or that the General Court would not perform its constitutional duty of making such wholesome laws thereafter as the public welfare should demand. The law, therefore, violates no contract with the defendant; and the only other question is, whether it is in violation of any right reserved under the Constitution to the individual citizen. Upon this question, there seems to be no room for debate. It does not forbid any person, firm or corporation from employing as many persons or as much labor as such person, firm or corporation may desire; nor does it forbid any person to work as many hours a day or a week as he chooses. It merely provides that in an employment, which the Legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this Commonwealth that reference to the decisions is unnecessary.

*Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, 384.

## Scope of Authority

In the sensational prosecution of William Wyman in 1843 for embezzlement of funds from the Phoenix Bank of Charlestown, the District Attorney for the Western District of Middlesex County, Daniel Wells, made a particularly noteworthy summation on the doctrine of *authority* in his argument to the jury at Lowell.

1. "An agent acts in behalf of the principal who employs him. He has no authority in himself, but is clothed with just so much power as this principal has seen fit to confer upon him and no more."
2. "This authority may be either express, as by a warrant of attorney, (i.e. power of attorney) or other written or express verbal authority; or it may be inferred as derived from various facts and circumstances showing the nature of the connection between the parties."

## Express Authority

3. "Where power is express, the question of authority is a question of law, depending upon the construction to be given to the language which is used conferring the power. In the present case, no express authority is pretended. . . . The conduct of the accused is admitted to have been in violation of the by-laws of the Bank, and the recorded votes of the meetings of the Stockholders and Directors. The remarks offered will therefore be confined to the law of implied authority, and in regard to this the following principles may be stated as universally recognized."

## Implied Authority

4. "As the agent acts instead of the principal, and on his account, he is always bound to conduct in conformity with his wishes, if they are known or can be ascertained with reasonable care. . . . It would be a contradiction in terms to say, that an agent was authorized to do an act in contradiction to the known wishes of his employer.

5. "An agent is always bound to consult the benefit of his principal, and he necessarily exceeds his authority when he knowingly goes against his interest. He does not necessarily go against this interest, when without any corresponding advantage realized or expected, he puts the property of his principal to an unnecessary hazard.

6. "Although the authority of the agent is general in its terms — yet it is necessarily limited by the usual course of the business in which he is employed, and he has no right to do anything beyond that usual course. . . . Thus if a broker should give to his clerk a general authority to loan money; this authority would, without any words to that effect, be construed to be limited to loaning to persons in good credit, and on the usual terms, and in the usual manner.

7. "It would give no warrant for making a loan, unprecedented in amount to sustain a rotten concern, accompanied with a careful concealment of the fact from the knowledge of the principal. So if the clerk of a merchant were authorized generally to sell goods upon credit, this would give him no right to make secret sales to insolvent persons or those of doubtful credit.

8. "All of these questions of authority may be brought to a single test. Would the principal, judging from the authority conferred and supposing him not to have changed his mind, have directed the act to be done or consented to the doing of it, provided he had been consulted about it, previous to it being done? In every case where it can be seen, that such a consent would not have been given, there is clearly a want of authority."

In modern times, the *scope of authority* question has taken on new facets. We now see the Board of Directors and officers smugly contemplating the profits made from activities they have forbidden by express written directions. The old rule is the same after all because their reckless toleration is the equivalent to a consent. The

mere fact that a denial of authority is bound to be almost automatic in these cases should impress no one.

And in almost any case where evil is tolerated, the profit motive is not far off. Earnings from criminal conduct often result (temporarily) in profits and acts in this direction are in behalf of the corporation.

## Individual Responsibility

The Model Penal Code and this proposed statute declare that a person is legally responsible for any conduct he performs or causes to be performed in the name of a corporation, to the same extent as if it were performed in his own name and behalf, and in the Model Code a corporate agent is personally responsible for a reckless *omission* to perform a duty imposed by law on the corporation. It is thus a two-way concept which imposes liability on the corporate criminal as well as the corporate executives and agents who lead their corporation astray.

See *Com. v. Dyer* 243 Mass. 296 for an example of a case where a corporation was actually organized to commit business crimes. It was not, apparently, indicted but Dyer and the others who caused the criminal activities to be performed in the name of the corporation were held legally responsible.

### A. Jurisdictional Point

According to the indictment presented by the Suffolk County Grand Jury in the small loans cases, the corporations involved were all Delaware corporations involved in a conspiracy to do things inimical to the public interest to defeat and defer certain legislative, administrative and executive actions intended to regulate and affect the conduct of the business of making small loans. Nine loan companies, including three management organizations, were indicted.

The individuals indicted included some from Pennsylvania, Washington D. C., Wilmington, Delaware, New Jersey, and Chicago as well as from Massachusetts.

It has already been observed that a corporation acts by agents. If the corporation is located outside Massachusetts and the agents participate in activities within this commonwealth which are of a criminal nature, does it not follow as a matter of logic that the corporation has committed a criminal offense within the jurisdiction of the courts of this commonwealth?

## Defenses

It might be observed that the Proposed Official Draft of the Model

Penal Code of the American Law Institute (Section 2.07) contains provisions like those in the suggested statute. The language of the Model Penal Code is by no means identical but the basic concept is the same so far as making the corporation criminally liable for the acts of its agents.

The Model Penal Code also provides for certain defenses on the part of the corporation which it can plead in an effort to avoid a conviction under a statute which indicates a legislative purpose to impose criminal liability on the corporation. By way of summary, these defenses and procedures are as follows:—

- a. First, there is no real defense if the offense is one (such as over-time parking) where strict or absolute criminal liability has been imposed by the legislative enactment.
- b. Second, where there is no indication of a case of absolute or strict criminal liability, it shall be a defense if the defendant corporation proves by a preponderance of the evidence that the “high managerial agent” having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission (except where the statute makes this sort of defense untenable).
- c. The special defense is not available where the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or where the commission of the offense was authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

We recommend the following

## 1970 DRAFT ACT

AN ACT DEFINING THE CRIMINAL LIABILITY OF CORPORATIONS AND ESTABLISHING CRIMINAL LIABILITY OF INDIVIDUALS FOR CORPORATE CONDUCT.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Chapter 274 of the General Laws is hereby amended by adding after Section 7 the following new section:—

*Section 8.* As used in this section, the following words shall have the following meanings:—

“Agent” means any director, officer, servant, or employee of a corporation, or any other person who is authorized to act in behalf of the corporation.

“High managerial agent” means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.



A corporation is criminally liable for conduct constituting an offense if:

(a) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is a misdemeanor, or the offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on a corporation;

(b) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.

## 5. Punishment of Corporations by Fine

# HOUSE . . . . (1969) . . . . No. 2240

### AN ACT PROVIDING PUNISHMENTS FOR CORPORATIONS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Chapter 279 of the General Laws is hereby amended by adding after section 5 the following section:—

*Section 5A. Punishment of Corporations.*—Notwithstanding any other provision of law unless such provision shall impose a sentence greater than that set forth in the following clauses, any corporation which commits a crime shall be punished as follows: first, if an individual committing that crime could be punished by a fine of ten thousand dollars, by a fine of not more than fifty thousand dollars; second, if an individual committing that crime could be punished by imprisonment in the state prison for ten years, by a fine of not more than fifty thousand dollars; third, if clauses first and second do not apply and an individual committing that crime could be punished by a fine of five thousand dollars, by a fine of not more than twenty-five thousand dollars; fourth, if clauses first and second do not apply and an individual committing that crime could be punished by imprisonment in

18 the state prison for five years, by a fine of not more than  
19 twenty-five thousand dollars; fifth, if clauses first through  
20 fourth do not apply and an individual committing that crime  
21 could be punished by imprisonment in the state prison for  
22 any term or by imprisonment in a jail or house of correction  
23 for two years or more, by a fine of not more than fifteen  
24 thousand dollars.

25 If none of the penalties provided in paragraph one of this  
26 section apply to said corporation, and if not otherwise  
27 provided by law, by a fine of not more than ten thousand  
28 dollars.

Assuming that a corporation can and does commit a crime, there is little difficulty in concluding that it can be sentenced to pay a fine.

It has long been the attitude of the law that corporations can be made subject to prosecutions for the commission of criminal acts. While one can not imprison a corporation, its charter can be revoked and its stockholders or members can be affected by the imposition of a fine.

It is for the legislature to determine the amount of the fine or the formula by which a fine can be definitely and specifically set forth in a general law applicable to all corporations.

Since there is no attempt to pick and choose between the different types of corporations, and there are many, it would seem that any corporation could be fined if it committed a crime. One wonders if a hospital could be fined if its Chief of Surgery committed the crime of abortion in an operating room.

Although it is often remarked that a corporation lacks a soul or a conscience, others are of the opinion that "It is as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation". *U.S. v. McAndrews and Forbes Co.* 149 Fed. 823.

The problem becomes somewhat clearer when one is thinking in terms of the business corporation only.

Perhaps the most dramatic case of the punishment of a business corporation is found in *Standard Oil Co. of Indiana*, 164 Fed. 376, where the Standard Oil Company was fined over twenty-nine million dollars for anti-trust violations. This fine was not sustained on appeal. In cases such as this, it should be apparent that the penalty could fall not only on the stockholders and directors of the corporation, but also on creditors and on employees who do not participate in the activity which resulted in the fine.

The total fines in the G.E. case amounted to \$1,924,500 of which amount forty-four individuals paid \$137,500 and the corporations

paid the balance. Only seven executives were jailed, although numerous others were given suspended sentences.

The sentences in the G.E. case were given on February 6th and 7th, 1961 and within a week, the market price of G.E. dropped to such an extent that \$684,192,000 was wiped out on paper, for the time being. The paper value of Westinghouse had a temporary decline of about \$174,000,000.

The corporation could only act through its agents who had led it down the road to perdition. Its guilt was their guilt.

In another interesting case, *U.S. v. Cotter*, 60 F. (2d) 689, 694 the corporation was fined for use of the mails to defraud investors who bought its stock. Quite obviously, the duped stockholders had already suffered loss by paying too much for their stock. Justice Learned Hand summed it up:—

“The company protests against the fine levied against it. It argues that this merely takes from the victims of the fraud, assuming that there was a fraud, part of the little that was left them. We agree. Why it should promote observance of the law to put into the public treasury money of which innocent persons have been robbed, is not apparent. But it is a matter with which we have nothing to do; the company was a juristic person to which, by a fiction, criminal responsibility is imputed. It could commit a crime and be punished in the only way it could be made to suffer. Where the burden falls, the trial judge must consider; we have no power to change his decision. So far as our opinion may be thought of consequence in other cases, we may, however, say that when the company is insolvent, as it always is, we can see no good reason for more than nominal punishment.”

There are many cases where the company is not only not insolvent, but in fact enjoyed a highly profitable excursion into criminal activities either by acts of commission, such as price fixing, or by failure to act or to comply with the law in a variety of situations ranging from non-payment of overtime to employees to tax evasion.

The stockholders in these companies, including those who had no knowledge of the improper activities of the executives, suffered financial loss by the fines and by the decline in market values. It is not difficult to say that some of this punishment fell upon innocent persons, albeit indirectly. It might also be said that innocent parties, along with the guilty, could and did, at least in the G.E. case, share in the profits from the corporate wrongdoing. The court was justified in leaving these things as it found them.

“In *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294 (1899) the corporation which published the *Worcester Daily Telegram* was fined \$100.00 for publishing a story that the plaintiff in a case on trial in the Superior Court had been offered \$80.00 but demanded \$250.00 and went to law when it was not agreed to, by the town of Holden. The Court

found that this was a contempt and that "said article was calculated to obstruct the course of justice in said court and prevent a fair trial" in the civil case then being heard.

In his decision Chief Justice Field noted that counsel for the newspaper argued that "an intent cannot be imputed to a corporation in criminal proceedings." Field then said in his decision:—

"We think that a corporation may be liable criminally for certain offences of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong."

It was also said in this case, which deals with criminal contempt of court, that "if the corporation cannot be punished by a fine, it will escape all criminal liability." The court cited instances where corporations had been indicted for misfeasance as well as nonfeasance.

A city or a town may be "punished" (and fined) for contempt of court or for its failure as a municipal corporation to carry out the order of the court. *Com. v. Hudson*, 315 Mass. 335.

A corporation can thus commit a crime even without any corporate intent of any sort, In *Com. v. Minicost Car Rental Inc.* 1968 Adv. Sh. 1267 a \$10.00 fine was imposed on the corporation when one of its customers parked a car illegally. The parking ordinance made no nice distinctions relative to the soul of a corporation but merely provided a sanction against the registered owner. In deciding the case, Chief Justice Wilkins said:—

[2] The defendant's contentions, based upon the absence of any requirement of knowledge on the part of the owner of the offending vehicle who was not the operator at the time of the violation, are that there was a denial of due process and of the equal protection of the laws.

The defendant does not trouble to cite or explain *Commonwealth v. Ober*, 286 Mass. 25, 189 N.E. 601, where there is but one factual distinction from the case before us. In the *Ober* case it does not appear who made the improper parking. In the case at bar, the improper parking was by one who rented the automobile from the defendant. This, however, is a distinction without importance. As was pointed out in the *Ober* case, at page 32, at page 603 of 189 N.E., "The inconvenience of keeping watch over parked vehicles to ascertain who in fact operates them would be impracticable, if not impossible, at a time when many vehicles are parked. . . . [T]he rules and regulations of the Boston Traffic Commission . . . were framed and intended to cover and make punishable any violation . . . by the owner of any vehicle registered in his name. . . ."

This doctrine is not impaired by *Morissette v. United States*, 342 U.S.



246, 72 S.Ct. 240, 96 L.Ed. 288, or *Lambert v. People of State of California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228, both of which recognize that many public welfare crimes that require no intent are valid.

The defendant argues that where the penalty is not minor, absence of a scienter requirement may result in a deprivation of property without due process of law. It refers to *Commonwealth v. Buckley*, Mass.,<sup>b</sup> 238 N.E.2d 335. In the case at bar, the penalty of a fine not exceeding \$20 is very definitely minor.

But what if the penalty had been substantial?

The owner here could not anticipate a person would park illegally. Chief Justice Wilkins spoke of the lack of specific intent:—

“As said in the *Buckley* case at page 337,<sup>c</sup> “Generally, however, it has been held that the Legislature may make criminal an act or omission even where the person responsible has no ‘blameworthy condition of the mind,’” citing authorities, including *Commonwealth v. Ober*, 286 Mass. 25, 30, 189 N.E. 601, *supra*. This is but another instance where the penalty is “relatively small, and conviction does no grave damage to an offender’s reputation.” *Morissette v. United States*, *supra*, 342 U.S. 256, 72 S.Ct. 246.

To move away from such reasoning, the defendant seeks to rely upon its large business as a rental agency whose vehicles are operated by many different renters. It asserts that there would be a large economic waste, but that argument does not apply to the case at bar, where there is only one conviction and a small fine. That the defendant may later be convicted of additional violations is not presently in issue. But beyond that, we would be slow to lighten the possible penalty for a large owner of cars in comparison with that for owners of fewer cars.”

Wilkins also pointed out that the contract required the renter to pay all fines. His final conclusion on the matter was this:—

“There is no deprivation of property without due process of law. Far from being a denial of the equal protection of the laws, a decision for the defendant would more likely create one.”

We recommend the following:

## 1970 DRAFT ACT

### AN ACT PROVIDING PUNISHMENTS FOR CORPORATIONS

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:*

Chapter 279 of the General Laws is hereby amended by adding after Section 5 the following section:

*Section 5A. Punishment of Corporations.* — Notwithstanding any other provision of law unless such provision shall impose a sentence greater

than that set forth in the following clauses, any corporation which commits a crime shall be sentenced to pay a fine not exceeding:

First, \$10,000 when the conviction is of a crime punishable in the state prison for not less than 10 years;

Second, \$5,000 when the conviction is of a crime punishable in the state prison for not less than 5 years;

Third, \$2,500 when the conviction is of a crime punishable in the state prison for not less than  $2\frac{1}{2}$  years;

Fourth, \$1,000 when the conviction is of a misdemeanor punishable by imprisonment for not less than 1 year;

Fifth, \$500 when the conviction is of a misdemeanor punishable by imprisonment for less than 1 year; and

Sixth, any higher amount equal to double the pecuniary gain derived from the crime by the corporation.

## V. SPECIAL STUDIES

1. Lowering the Age of Majority to Eighteen is Not Recommended
2. Credit Bureaus Should not be Made Liable for Ordinary Negligence but Corrective Legislation is Necessary to Protect the Public
3. A Private Bill

### 1. Lowering the Age of Majority to Eighteen Is Not Recommended

## RESOLVES . . . (1969) . . . Chapter 1

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RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY THE JUDICIAL COUNCIL RELATIVE TO THE FEASIBILITY OF LOWERING THE AGE OF MAJORITY TO EIGHTEEN YEARS.

RESOLVED, that the judicial council be requested to make an investigation and study relative to the feasibility of lowering the age of majority to eighteen years, and to include its conclusions and its recommendations, if any, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the current year.

*Approved Feb. 5, 1969*

The age of majority in Massachusetts is twenty-one years, both for male and female citizens. The Judicial Council was requested to study the feasibility of lowering this age to eighteen.

We are of the opinion that such a change would so vitally affect the citizens of the Commonwealth, that it is beyond our scope to make any decisions of policy.

We have not concerned ourselves with the question of the right to vote. In order for a person under twenty-one to enjoy the right to vote, it would be necessary to amend our Constitution. We have considered some of the changes in our law which might be brought about if a person under twenty-one was declared to have reached the age of majority at eighteen. When most of our younger citizens discuss this matter, they seem to center their thoughts around the following rights or privileges:—

- a. The right to purchase an automobile and the right to enter into contracts concerning the upkeep and maintenance of the automobile.

- b. The right to purchase liquor, transport it in a motor vehicle, and be served liquor at a restaurant or cocktail lounge etc.
- c. The right to establish credit in retail stores.
- d. The right to borrow money from a bank or a loan company.
- e. The right to vote.

With regard to a motor vehicle, the General Court has already taken some action to lower the age of majority to eighteen years old in a limited application to the purchase, repair, or sale of motor vehicles.

G.L. Chapter 90 Section 2C reads as follows:

"Section 2C. A minor eighteen years of age or older, if his parent or guardian assents thereto in writing, shall have full legal capacity to act in his own behalf in the matter of contracts for the purchase, repair, or sale of motor vehicles, parts or accessories therefor, and such contracts or any instrument relative to the financing of such contracts, if otherwise legal, shall have the same legal effect as if no minority existed."

This new statute results from Chapter 105 of the Acts of 1969, Approved June 10, 1969. Previously, G. L. Chapter 175, Section 113K provided that any minor, sixteen years of age or over, shall be deemed competent to contract for a motor vehicle liability policy to the same extent as if he had attained the age of twenty-one years.

It would thus appear that there is a strong legislative movement in the direction of lowering the age of majority to the age of eighteen, and even sixteen when it comes to dealing with motor vehicles and motor vehicle insurance.

There are other instances in the General Laws which deal with a relaxation of the strict rule that a citizen does not become of age until his twenty-first birthday, but none of these can be said to indicate a real desire on the part of the General Court to reduce the age for all purposes.

According to the language in *Inhabitants of Danvers vs. City of Boston*, 27 Mass. 512, the twenty-one year rule was established in the province of Massachusetts Bay in 1751 by an Act of Parliament.

One of the most vexatious aspects of the business dealings of a minor under the age of twenty-one is concerned with the fact that such a person may disaffirm any contract that he might make. He may thus set aside the bargain and receive his money back, or receive back any other consideration which he might have given up. The adult party may not take advantage of this situation.

This state of things has become more important in the present generation when it is said that over one hundred million Americans are under the age of twenty-five.

Under the rule of law applicable in New York, however, there



has been an attempt to bring about a more just result. Section 3-101 (1) of the New York Law reads as follows:—

“A contract made by an infant after he has attained the age of eighteen years may not be disaffirmed by him on the ground of infancy, when the contract was made in connection with a business in which the infant was engaged and was reasonable and provident when made.”

In Massachusetts, except in those very few cases, where the statutes have altered the situation, the New York rule does not apply and the minor very definitely can set aside the bargain.

Quite apart from the general run of contracts which one could expect a young person to make is the situation regarding trusts and gifts which have been given to minors under the provisions of Chapter 201 A of the General Laws. Under this particular statute, which is the Massachusetts version of the Uniform Gifts To Minors Act, the custodian holds the property of the minor until the age of twenty-one. Many people feel that this is still a rather immature period in life for the distribution of any sizable gifts. In addition to the statutory provision, there are countless wills and trusts which require the trustees to hold property during minority. Many require that the property be held even longer.

Any change in the law which would reduce the age of majority from twenty-one to eighteen would therefore have a vast effect on property rights in Massachusetts.

Until the present time, the legislature has chosen to deal with the problem of minority on a limited basis. Because this matter involves question of legislative policy with which the Judicial Council is not prepared to deal, we do not wish to make any recommendation as to the feasibility of lowering the age of majority to eighteen years.

## **The Uniform Student Loan Act**

Another limited approach has been made to the problem of the minor under twenty-one and his contracts by the Uniform Student Capacity to Borrow Act which has been proposed by the National Conference of Commissioners on Uniform State Laws.

This act would allow an educational loan to be granted to a minor, and he would be legally bound to repay. This would not interfere with the basic body of law applicable to minors but it would recognize the ability of persons under twenty-one to obtain loans for an education.

At the present time, it is possibly feared that certain persons under twenty-one could disaffirm a contract for such a loan. If the parent will not or can not join in the loan, the chance of taking advantage of a loan for an education might be lessened. Whether

or not this act should be adopted by Massachusetts, we have not had occasion to consider; but we do point it out as being an attempt to deal with the problems of the young person under twenty-one on a particular basis, and we think this is the way we should proceed.

## 2. Credit Bureaus Require a Limited Privilege and Should Not be Liable for Ordinary Negligence. Remedial Legislation Is Needed To Protect the Public.

HOUSE . . . . (1969) . . . . No. 3870

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AN ACT RELATIVE TO THE FURNISHING OF ERRONEOUS INFORMATION BY A CREDIT RATING BUREAU OR ANY PERSON OR ORGANIZATION WHICH FURNISHES CREDIT RATING INFORMATION.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 "Chapter 259 of the General Laws is hereby amended by
- 2 inserting after section 4 the following section:—
- 3 Section 4A. A credit rating bureau or any person or organ-
- 4 ization which furnishes credit rating information shall be
- 5 liable in damages for ordinary negligence in furnishing er-
- 6 roneous credit rating information concerning any person or
- 7 corporation who has applied for credit from a third party
- 8 whether said information is furnished orally or in writing."

### Credit Bureaus Are Now Privileged

House (1969) 3870 would change the law and make a credit rating bureau liable for ordinary negligence when erroneous information is furnished about an individual or his credit. At the present time, the law recognizes a conditional privilege on the part of a credit bureau because of the public interest involved.

The credit agencies take the position that the conditional privilege should be maintained because of the genuine business need for information of this nature. They say that this information protects against losses on credit transactions. They also contend that the existence of this credit information is one of the reasons if not the major reason for the ease with which credit can be obtained. It is asserted that the proposed legislation could seriously impede the free flow of credit information. It has been contended that to make a credit agency liable for ordinary negligence for furnishing erro-

neous information would be an unconstitutional restraint on its activities under the First and Fourteenth Amendments to the United States Constitution. In the case of *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.* the U. S. District Court in Pennsylvania said that the long established recognition of the necessity of quick credit information includes the activities of the credit reporting bureau such as Dun & Bradstreet as being in the interest of the business community within the sphere of the privilege extended to matters of "public concern" as defined in the case of *New York Times v. Sullivan*, 376 U.S. 254 (1964).

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NOTE: A tort case based on a false representation that another person was "worthy of credit" where this was known to be false was known in 1829. *Winslow v. Draper*, IX Pick. 169.

Whether in fact there is a constitutional protection for credit reporting agencies is a question which we will not deal with here.

We do not doubt that a credit agency can be guilty of conduct which will cause harm to other persons. Credit agencies do not hold themselves out as accountants. At best they gather the information concerning prospective debtors by resorting to the available avenues of information—reference to poor debtor court records—reference to bankruptcy records—interviews with the applicant for credit—and where available, interviews or references to other credit agencies. Sometimes the information is gained surreptitiously. Sometimes the data is gathered by investigators who are not well trained or well qualified. Some businessmen absolutely refuse to give information with respect to their customers. The courts and the probation department do not give out information on criminal records to just anyone who requests it. When all this is considered, the best that a credit agency can do is to give what might even amount to an informed guess as to the likelihood or prospects of an applicant for credit, and his responsibility. The amount charged by the credit bureau is small on a case basis. We do not have any figures on the earnings of credit bureaus to decide whether or not the business is a profitable one, but we are convinced that what they charge for the individual credit report, which is sometimes \$5 to \$10 or even less, does not permit the agencies to make extensive investigation as to some individual. In addition, the mobility of people in the United States is such that credit agencies must rely on similar organizations in other cities for the background on a particular individual.

In *Ultramares Corp. v. Touche*, 255 N. Y. 170, 179, Judge Cardozo declined to hold an accounting firm liable for damages re-

sulting from a misrepresentation innocently made by a firm of professional accountants to the detriment of their customer. The court reasoned that to hold the defendant liable would expose newspapers and other information service companies with damage claims absurdly out of proportion to the reward received for their service. The *Ultramares* case dealt with an innocent misrepresentation and it might be assumed that the accountants used at least reasonable care.

## The Proxmire Proposal

Probably the most comprehensive collection of material concerning credit bureaus and credit rating information is contained in the report of the hearings before the subcommittee on Financial Institutions of the Committee on Banking and Currency, U. S. Senate 91st Congress, First Session. These hearings which are collected under the heading of "Fair Credit Reporting" deal with Senate Bill 823 which was filed on January 31, 1969, by Senator Proxmire. The purpose of Senate 823 is "to enable consumers to protect themselves against arbitrary, erroneous, and malicious credit information." Senator Proxmire's bill was passed in the Senate on November 9, 1969. It was referred to the Committee on Banking and Currency again, but this time in a modified form. The bill, House (1969) 3870, is limited in its scope in comparison with the U. S. Senate Bill 823, filed by Senator Proxmire. It might be pointed out that under the Proxmire proposal, civil liability is imposed on a credit bureau for willful non-compliance with the standards which are established for crediting reporting agencies. In addition, the Proxmire bill imposes civil liability for "grossly negligent non-compliance."

The Massachusetts proposal is limited in the sense that it does not set forth the standards of "fair credit reporting" which are found in the Proxmire bill.

A recent survey of the law applicable to credit bureaus was made in the *Georgetown Law Journal* for February, 1969. In this law journal article, the statement was made that:—

"Despite the scope and nature of credit investigations and the serious inaccuracies or misinformation they may produce, the individual who is the subject of a credit report is all but unprotected in most jurisdictions. Most of the actions against credit bureaus are libel suits; they are seldom successful, however, because the majority view is that a report by a credit bureau to a particular subscriber whose legitimate business interests are involved or appear to be involved is conditionally privileged. Thus, in the absence of malice, the subject of the report has no cause of action against the credit bureau regardless of the falsity of the report. Basis for



the privilege is that the credit bureau is performing a necessary and useful business which benefits those who have a legitimate interest in the report.

The privilege is only conditional, however, and may be lost in several ways. The bureau loses the privilege if it releases the report to the general public or to disinterested as well as interested subscribers. The rationale for this exception is that the publication of defamatory material by a business for a profit can be upheld solely on the ground of public convenience. Individual rights should not be made subservient to business agencies more than is necessary to satisfy reasonable public interests. These public interests are "adequately served by extending the immunity of privileged communications only so far as to embrace communications to subscribers who have a special interest in the information." The definition of an interested subscriber is vague, however, and a superficial inquiry into the subscriber's motives will apparently insulate the credit bureau from liability."

The comment in the Georgetown Law Journal goes on to say that the privilege is also destroyed if the statement is made with malice, that is express or actual malice. This requires a showing of bad faith, ill will, or other improper motive. A majority of courts reject the view that the privilege is abused only when the credit bureau lacks probable cause or reasonable grounds for believing the statement. Most courts hold that negligence will not destroy the privilege. In Massachusetts the case of *Retailers Commercial Agency, Inc.* petitioner (*Shore vs. Retailers Commercial Agency, Inc.*) 342 Mass. 515 (1961), is an example of the philosophy of the law with regard to credit agencies in Massachusetts.

A credit agency had reported on the plaintiff in an extremely unfavorable manner. It indicated that he was certainly not a person to whom any credit should be extended. The credit agency did not contend that the report could not have been found to be defamatory, it simply argued that the report was conditionally privileged. Our Supreme Judicial Court held that a report made by a mercantile agency to an interested subscriber should be conditionally privileged. It was said that such reports apply a legitimate business purpose and ought to have the protection of the privilege.

In this respect the Massachusetts courts follow the general rule mentioned in the article in the Georgetown Law Journal in 1969. The Massachusetts court in *Retailers Commercial Agency, Inc. supra* said that the conditional privilege is destroyed if abused, but in effect, the injured party must show that the abuse has taken place. Our court also finds that the protection or the privilege is indeed lost if there is a definite proof of malice. It also said that if a credit bureau makes a report asserting it to be true when there is no reasonable ground or probable cause for such an assertion, it

could be found that there is an absence of good faith and abuse of the privilege. Our Supreme Judicial Court made this comment:—

“There is no social utility in reports that are made recklessly or without reasonable grounds. The injury to the subject of the report can be great and the person receiving the report gains nothing.”

In the *Retailers Commercial Agency* case, *supra*, the plaintiff argued that the real test should be whether or not the defendant had used reasonable care. Our Supreme Judicial Court said that there was some support for the theory that negligence may destroy a conditional privilege, but said that this view, although having something to commend it, has not generally been accepted by the courts and with good reason, for it would place undue limitations on the communications the law seeks to protect.

The most significant statement is found in *Retailers Commercial Agency, Inc.*, *supra*, at page 522 where our Supreme Judicial Court says:—

“The fact that these communications are confidential and that great speed may be required in their preparation militate against a rule that would destroy the privilege by proof of ordinary negligence.”

The bill which was referred to the Judicial Council, House (1969) 3870 would make the credit bureau liable for ordinary negligence.

If the Proxmire bill in the U. S. Senate is enacted, a credit bureau will not be liable for ordinary negligence. It will only be liable for “wilful non-compliance” with the requirements applicable to credit reporting agencies, or for grossly negligent non-compliance with the standards which will be applicable to all credit reporting agencies in the United States.

The most significant requirement that would be imposed upon credit reporting agencies by the Proxmire bill is the opportunity for an individual to correct inaccurate or misleading information in his file.

The person using the credit reporting agency would have to advise an individual of his bad credit report if he was rejected for credit, insurance, employment, etc. In this way, the individual would be alerted of the possibility of an inaccurate dossier on him.

The third important provision of the Proxmire bill involves derogatory items entered in the file. A credit reporting agency would be obliged to notify the individual that such items were being placed in a file. Again the individual would have an opportunity to correct the file or to supply additional information at a later date.

In order to avoid liability, a credit reporting agency would have to destroy obsolete information after a reasonable time, and certain limits on confidentiality would be imposed. A credit reporting

agency could not furnish information except in connection with a legitimate business need. The Federal legislation which is being proposed, therefore, contains a comprehensive plan for the proper functioning of a credit reporting agency. If the agency should follow the outline of this plan and do what is required of it by the Federal Legislation, it would be protected and no libel suit could be successfully prosecuted against it, nor could the individual collect damages if the credit information resulted in some adverse situation. The individual affected could only recover damages if the credit reporting agency was shown to have wilfully violated the Federal law or to have been guilty of gross negligence.

### **Testimony of W. F. Willier, Consumer Law Director**

House (1969) 3870 provides only a right of damages on the part of the individual where a credit rating bureau has been guilty of ordinary negligence. There are no standards set forth for the proper operation of a credit rating information company or organization. It would seem that the approach taken by Senator Proxmire in U.S. Senate Bill 823 has much more to recommend it than a bill which merely makes a credit reporting agency liable for ordinary negligence. There may be abuses in the credit reporting business. In his testimony before the Senate Committee, Mr. William F. Willier, Director of the National Consumer Law Center at Boston College, told Senator Proxmire and the Committee that there was no question but that the Greater Boston Credit Bureau "exercises a high degree of care in its operations, and yet a number of errors and abuses remain possible." Willier said that the bureau's records regarding the disposition of court cases are almost invariably incomplete. He indicated that the cost of tracing the outcome of lawsuits would be prohibitive. Willier also said that the legislation proposed by the Consumers Council in Massachusetts suggested the disposition of obsolete information. During the month of December, 1969, a public announcement was made by one Boston Credit Agency that it was selling its files on thousands and thousands of names to the highest bidder. In addition, Willier said that the Massachusetts Consumers Council recommended that the debtor be permitted to correct information adverse to him. House (1969) 3870 is only one of the bills apparently supported by the Consumers Council. Willier stated that he suggested "we do away with the majority rule that credit rating bureaus have a privilege, that unless malice is established, they are not liable for defamation or libel; and we have a bill pending in Massachusetts to at least obligate them to exercise due care and apply a simple test of negligence."

Willier contended to the U. S. Senate hearing that the credit reporting business is a commercial venture and should be subject to the obligation of due care. In answer to Senator Proxmire's question, Mr. Willier stated that he did not think that credit bureaus could be impartial.

## **The Balance of Rights**

We do not think that the answer to the conflict of rights between the consumer and the credit agencies lies in the adoption of a statute such as House (1969) 3870. The whole picture of the credit information business is currently the subject of committee hearing and discussions in Washington. The comprehensive plan presented to Congress by Senator Proxmire and others indicates how the problem is approached as a whole. The suggested bill (House 3870) is only a small part of this picture. We think it useful to the general court for us to discuss the legislation suggested in Washington and its relationship to the law of Massachusetts at this time. We do not recommend the enactment of House (1969) 3870. We are hesitant to suggest a draft act which will cover only a part of the credit reporting problem. We are of the opinion that if credit bureaus file erroneous reports, either by reason of negligence or otherwise, they should be required to correct the record of the individual when it is discovered that erroneous information is contained in their files. A reference to the Proxmire bill, which is summarized in this report, will indicate that Section 611 would cover the procedure where such a situation obtained. We are also of the opinion that if an individual learns that some false or erroneous information is contained in his file in a credit reporting bureau, and if he apprises the bureau of this false or erroneous information and asks for a correction, the failure of the credit reporting bureau to make such correction would be malice sufficient to destroy any privilege that the credit bureau might have.

The full text of Section 611 of the Proxmire Bill (U.S. Senate 823, 91st Congress, First Session—Committee Print No. 5) is as follows:

“(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory infor-



mation in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received."

## **Suggestions for Legislation**

The full text of Section 616 and 617 of the Proxmire bill is as follows:

### **§616. Civil liability for willful noncompliance**

"Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of

1. Any actual damages sustained by the consumer as a result of the failure;
2. Such amount of punitive damages as the court may allow, which shall not be less than \$100 nor greater than \$1,000; and
3. In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court."

## **§617. Civil liability for grossly negligent non-compliance**

"Any consumer reporting agency or user of information which is grossly negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of—

1. Any actual damages sustained by the consumer as a result of the failure;
2. In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court."

If the General Court wishes to report a bill in this area, the provisions of the Proxmire bill would seem to be appropriate.

## **SUMMARY OF THE "PROXMIRE" BILL, U. S. SENATE NO. 823, 91st CONGRESS**

### **"FAIR CREDIT REPORTING ACT"**

The following is a summary of the more important features of the bill:—

#### **Sec. 604. Permissible Purposes of Reports.**

Limits the furnishing of consumer reports to five purposes: (1) credit; (2) insurance; (3) employment; (4) obtaining a governmental license or other benefit; or (5) other legitimate business need involving a business transaction with the consumer. Any broader use would require either a court order or the consumer's written permission.

#### **Sec. 605. Obsolete Information.**

Prohibits the reporting of adverse information older than seven years, or 14 years in the case of information on bankruptcies, except in connection with life insurance contracts in excess of \$25,000, extensions of credit in excess of \$50,000 or employment applications for jobs with an annual salary in excess of \$20,000.

#### **Sec. 606. Disclosure of Investigative Reports.**

Requires those who order investigative reports to disclose that an investigative report may be made and that the consumer has a right to request disclosure of the complete nature and scope of the investigation. This provision would not apply if the report is for employment purposes and the consumer has not specifically applied for the employment.

**Sec. 607. Compliance Procedures.**

Requires reporting agencies to maintain procedures to preserve the confidentiality and proper use of information. Users must certify the purposes for which information will be used and agree not to use the information for other purposes. Reporting agencies must make a reasonable effort to check out new users.

**Sec. 608. Disclosures to Governmental Agencies.**

The disclosure of information to governmental agencies is limited to identifying type information such as name, address and place of employment unless the governmental agency has obtained a court order or is a bona fide creditor, insurer, employer, or licensor.

**Sec. 609. Disclosures to Consumers.**

Requires reporting agencies to disclose, at the request of a consumer, the nature and substance of all information in the consumer's file, the sources of the information unless it is an investigative report, and the persons who have received reports on the consumer during the past 6 months for credit or insurance purposes and the past 2 years for employment purposes.

**Sec. 610. Conditions of Disclosure to Consumers.**

Requires disclosures to be made during normal business hours and on reasonable notice. The disclosure may be made at the credit reporting agency or over the phone if the consumer so requests in writing and furnishes proper identification. Reporting agencies must provide trained personnel to explain the information in a consumer's file. The consumer has the right to have one person accompany him. Reporting agencies and their sources are given immunity from libel suits as a result of information disclosed to consumers pursuant to the act unless the information was furnished with malice or willful intent to injure the consumer.

**Sec. 611. Procedure in Case of Disputed Accuracy.**

If the completeness or accuracy of an item of information is challenged by a consumer, the credit reporting agency must reinvestigate and record its current status. Inaccurate or unverifiable information must be deleted. The consumer has a right to file a brief explanatory statement on disputed items which must accompany future reports. The consumer may also request that previous recipients be notified of any corrections.

**Sec. 612. Charges for Certain Disclosures.**

Disclosures shall be free of charge to consumers who are rejected for credit, insurance or employment or who are charged higher rates for credit or insurance and who have been so notified by the creditor, insurer, or employer. Similarly, disclosure charges cannot be made to persons who have received a dunning letter from a collection affiliate of the reporting agency. In all other cases, the reporting agency may establish a reasonable disclosure charge.

The cost of sending corrected information to the prior recipients of a report shall be at the expense of the reporting agency when information is deleted because it is inaccurate or unverifiable. When the item is in dispute,

the reporting agency may charge the consumer for notifying prior recipients.

**Sec. 613. Public Record Information for Employment Purposes.**

Reporting agencies cannot report adverse items of public record information for employment purposes unless they maintain strict procedures to keep the information up to date. If this cannot be done, the consumer must be notified that the adverse information is being reported and to whom at the time the report is made.

**Sec. 614. Restrictions on Investigative Consumer Reports.**

Adverse information developed on investigative reports which is more than three months old cannot be reported again unless it is reverified. Those who make investigative reports must follow procedures to assure maximum possible accuracy.

**Sec. 615. Requirements on Users of Consumer Reports.**

Those who reject a consumer for credit, insurance or employment or who charge a higher rate for credit or insurance wholly or partly because of a consumer report must, upon written request, so advise the consumer and supply the name and address of the reporting agency. If a consumer is turned down for credit or charged a higher rate based on information other than a consumer report, the nature and substance of this information must also be disclosed on written request. The consumer's right to make such a request must be disclosed at the time he is turned down for credit, employment, or insurance or charged a higher rate for credit or insurance.

**Sec. 616. Civil Liability for Willful Non-Compliance.**

Consumers can bring civil actions to enforce compliance. If a willful violation can be shown, the consumer can collect actual damages, punitive damages of up to \$1000 and attorney fees.

**Sec. 617. Civil Liability for Grossly Negligent Non-Compliance.**

If the consumer can show a grossly negligent violation, he can collect actual damages plus attorney fees.

**Sec. 621. Relation to State Laws.**

State laws which are inconsistent with the Federal law are pre-empted to the extent of the inconsistency.

### 3. A Private Bill re R. L. Burno

**HOUSE . . . . (1969) . . . . No. 4766**

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AN ACT AUTHORIZING THE CITY CLERK OF THE CITY OF HAVERHILL AND THE STATE SECRETARY TO CHANGE A CERTAIN RECORD.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*



1       Notwithstanding any provision of law to the contrary, the  
2       city clerk of the city of Haverhill and the state secretary are  
3       hereby authorized and directed to change the birth certificate  
4       and marriage certificate of Robert L. Bruno, who was born on  
5       May ninth, nineteen hundred and twenty-six and married on  
6       June third, nineteen hundred and sixty-one, so as to delete and  
7       expunge any reference to the name "Bruno" and substitute  
8       therefor the name of "Atwood".

The bill which we are asked to consider is a proposal in behalf of Robert Leonard Burno. House (1969) 4766 refers to Robert L. Bruno, but the records in the city hall in Haverhill indicate that the gentleman's name is Burno.

We have carefully investigated the subject matter of this bill, and we find that it involves the correction of a record which was duly and properly made in accordance with the statutes of the Commonwealth.

We do not believe it would be useful to anyone to discuss the details of this particular case. Mr. Burno and others in his behalf presented the details fully to a hearing held by the Committee on Government Regulation. Officials who are interested in the integrity of the vital statistics records take the position that the integrity of official records should not be eroded away by legislative or judicial corrections which are not in conformity with the statute applicable.

We understand that Mr. Burno has attempted to have the record corrected by judicial proceedings without success.

We do not believe that the Legislature should enact special laws to change birth and marriage certificates.

In the future, situations of this kind may be remedied to some extent by the provisions of Chapter 249 of the Acts of 1969 which allows adoption decrees *nunc pro tunc* should one of the adopting parents die prior to the entry of the decree of adoption. (G.L. Ter. ed. Chapter 210 Section 68).

This private bill would satisfy Mr. Burno, but would not be in the public interest. It should not be further considered.

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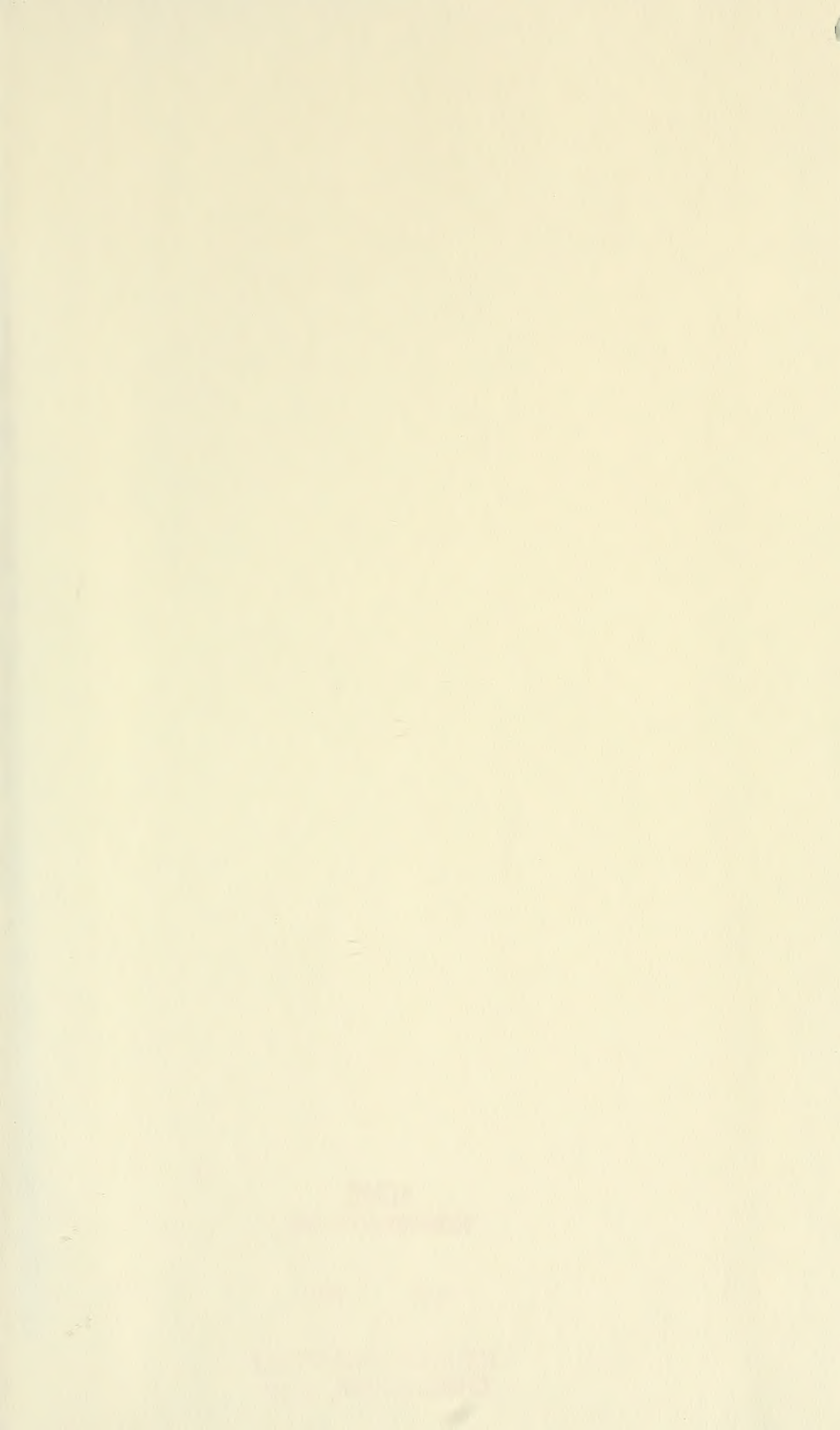
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